RONALD C. RICE
COUNCIL MEMBER - WEST WARD

MEMORANDUM

CITY HALL ROOM 304
920 BROAD STREET
NEWARK, NEW JERSEY 07102
(973) 733-6427

To: Bo Kemp
Business Administrator/Acting Director, Engineering

Melvin Waldrop
Acting Director, Neighborhood and Recreational Services

Steve Morlino
Facilities Management, Newark Public Schools

Marion Bolden
Superintendent, Newark Public Schools

From: Ronald C. Rice
West Ward Councilman

RE: **Neighborhood Requests from Tuxedo Parkway**

Date: July 25, 2007

On Saturday, July 21, 2007, I met with residents from Tuxedo Parkway at their annual block party. The following needs and problems as expressed by the residents are listed for appropriate redress:

School Issues

For the upcoming school year, please strongly direct the teachers and administrative staff of Mt. Vernon School to refrain from speeding down Tuxedo Parkway as they are endangering a handicapped child that resides at 181 as she prepares to go to school herself. Please institute an appropriate punishment for those that continuously violate this directive as the family has made complaints in the past to no avail.

Also, please provide a new lock to the gate at Mt. Vernon School on the Tuxedo Parkway side as it may be a potential location for illegal activity or a crime waiting to occur.

Curb Repairs

Please provide the rules and/or governing ordinances regarding the responsibility for curb repairs caused by city of Newark snow plows to The Mapp Family, located at 181 Tuxedo Parkway, Newark, NJ 07106.

Signage

Please provide wheelchair access signage for 181 Tuxedo Parkway and contact the above mentioned family as to the necessary steps to procure the signage for their home as the family has a handicapped child that is active and attends school.

Miscellaneous

Please forward the process for application for an overnight street parking permit to Ms. Paula Venable, [redacted]

Please respond accordingly and provide my office with a status update regarding these requests and your corrective action/response as soon as possible pursuant to your office's area of responsibility.

RCR/RR

Cc: Robert P. Marasco, City Clerk
Kenneth Louis, Deputy City Clerk
Terrance Bankston
Cherise Conte-Bush
Bill Letona
Jerusha Schulze
Council President Mildred Crump
Council Vice-President Luis Quintana
Councilman-At-Large Donald M. Payne, Jr.
Councilman-At-Large Carlos Gonzalez
The Mapp Family, [redacted]
Ms. Paula Venable, [redacted]

NATASHA AERIEL, individually; RENEE TUCKER, individually, and as Administratrix Ad Prosequendum and Administratrix for the Estate of Terrance Aeriel; SHALGA P. HIGHTOWER, individually, and as Administratrix Ad Prosequendum and Administratrix for the Estate of Iofemi S. Hightower; and JAMES HARVEY, individually, and as Administrator Ad Prosequendum and Administrator for the Estate of Dashon Harvey,

Plaintiffs,

v.

STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK; MARION A. BOLDEN, in her capacity as the State District Superintendent of the Newark Public Schools; NEWARK BOARD OF EDUCATION; STATE OF NEW JERSEY; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION; GERARD GOMEZ; JOSE LACHIRA CARRANZA; SHAHEED BASKERVILLE; RODOLFO GODINEZ; ALEXANDER ALFARO; MELVIN JOVEL; JOHN DOES 1 - 50; ABC ENTITIES 1-50; JOHN DOE PUBLIC EMPLOYEES 1-50; and XYZ PUBLIC ENTITIES 1-50,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
Docket No.: ESX-L-4320-08

Civil Action

PLAINTIFFS' BRIEF IN OPPOSITION TO STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK AND MARION A. BOLDEN'S MOTION FOR SUMMARY JUDGMENT

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
Tel: (973) 993-8100
Attorneys for Plaintiffs

On the brief:
Ronald J. Riccio, Esq.
Robert C. Scrivo, Esq.
John P. Michalski, Esq.

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PRELIMINARY COUNTER-STATEMENT

The State-Operated School District for the City of Newark ("District") and Marion A. Bolden ("Bolden") (collectively the "District") argue they are entitled to summary judgment because on the evening of August 4, 2007, the victims ("Victims" or "Plaintiffs") of vicious attacks ("Attacks") that occurred in the Mount Vernon School ("MVS") Schoolyard (the "Schoolyard") failed, as a matter of law, to use the Schoolyard with due care in the normal, foreseeable manner. (Def. Br. 13)[1]. The District's legal argument is premised entirely on the following facts:

i. Plaintiffs lawfully drove a car into the Schoolyard on the evening of August 4, 2007, through an open vehicular gate that freely permitted any pedestrians or any vehicle driven by anybody to enter the Schoolyard at any time, day or night. There were no signs of any kind prohibiting or warning Plaintiffs or anyone else not to enter the Schoolyard or limiting the use they could make of the Schoolyard;

ii. Plaintiffs lawfully parked their car in the Schoolyard which, at the time, was routinely used to park cars; and

iii. Plaintiffs got out of the car, sat down on a nearby set of steps located next to several rows of bleachers, shared a legal tobacco product, and generally hung-out with each other.

Even though the District has the burden of persuasion to show its entitlement to summary judgment, other than the conclusory statement that Plaintiffs did not, as a matter of law, use the Schoolyard with due care, the District has presented nothing to explain why, how or in what manner Plaintiffs lawful, benign, innocent, and reasonable use of a Schoolyard routinely left open to the public, amounts to a lack of due care, as a matter of law, within the meaning of the liability creating dangerous property provisions (N.J.S.A. 59:4-2) of the New Jersey Tort Claims Act.

[1] Citation to "Def. Br. __" refers to the District's brief in support of its Motion for Summary Judgment.

Not only do the facts relied on by the District fail to show the absence of due care as a matter of law but, also, the District's factual description of Plaintiffs' use of the Schoolyard (Def. Br. i) is a materially incomplete snapshot. For example, what the District fails to mention is that the four Victims had worked hard to better themselves and were all good and decent college students who were about to return to college. (PSF, ¶ 89)[2]. They entered the Schoolyard because they were simply looking for a place to spend some time together on a warm summer night on the eve of going back to college. (PSF ¶ 88-127 (describing Plaintiffs use of the Schoolyard and the Attacks)).

The Schoolyard was never closed and was always open for public use at night. This fact is confirmed by Samuel Gonzalez, the chairman of the District's Advisory Board. At the August 21, 2007 Advisory Board Meeting, held less than three weeks after the Attacks, Chairman Gonzalez affirmatively stated that the MVS Schoolyard was intended to be a "safe haven" left open for the public to use in the evening. (PSF ¶ 15(b)). Further, Steve Morlino, the District's Facilities Director, testified that it was "very common that people go into schoolyards and play basketball in the evening, 'til all hours of the night" and that "most of the time, most of the principals encourage the lot or the playground to be used by the community after hours." (PSF ¶ 15(d)). Contrary to the District's argument, the Schoolyard's use was not limited to "use as a school and school-related functions." (Def. Br. i).

Shelby Cowans, a corrections officer who lives next to the Schoolyard, states in his Certification that, for eight years prior to the Attacks he lived in a house immediately adjacent to the Schoolyard and he personally used the Schoolyard during non-school hours on nights and weekends. He states that no one has ever advised him that the Schoolyard was not open to the

[2] Citation to "PSF ¶ __" refers to the paragraph numbers of Plaintiffs' Statement of Additional Material Facts submitted in response to the District's Statement of Alleged Undisputed Facts.

public and/or was only to be used for school purposes or school related functions or activities. He adds that he has "observed people of all ages enter and exit the Schoolyard, at all times, including nights and weekends . . . when MVS was closed" engaged in, among many things, "playing catch with a football," "hanging out and having conversations," and "sitting on the bleachers and talking." (PSF ¶ 15(f)). The Certification of Houston Stevens, another person who lives near the Schoolyard and Vice President of the Tuxedo Parkway Block Association, corroborates Mr. Cowans. (PSF ¶ 15(g)). He states: "Prior to the Attacks, the Gate was almost always left open on nights and weekends" and that "the Schoolyard was used by many people to hang out and converse . . . ." Ibid.

The undisputed facts show that when the Victims arrived at the MVS Schoolyard they proceeded to use the Schoolyard in a manner no different than any other law-abiding person would do whenever people gather together in open public places, such as the Schoolyard. The Victims sat on a set of stairs, because the bleachers were occupied, listened to music, ate some food, and danced. (PSF ¶¶ 88-127).

Not only has the District not shown that Plaintiffs use of the Schoolyard, as a matter of law, fell below the due care standard, but the District has also tried to deflect the Court's attention away from the materiality of its palpably unreasonable conduct. Further, the District doesn't want the Court to consider the many obvious dangerous property conditions that existed in the Schoolyard on the night of the Attacks which the District knew about, but failed miserably to "protect against" as it was required by law to do under N.J.S.A. 59:4-2 (b). In this regard, it is important to note that "protect against" is defined by the Tort Claims Act to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." N.J.S.A. 59:4-1 (b). In essence, what the

District wants on this motion is for the Court to believe that the District's outrageous actions in relation to the Schoolyard's dangerous property conditions are "irrelevant" and "immaterial." (Def. Br. ii). The District is wrong and cannot escape this Court's scrutiny of its actions.

The District's outrageous actions in relation to the Schoolyard's dangerous property conditions are directly relevant and material to the Schoolyard's purposes and the nature of Plaintiffs' use of the Schoolyard. For example, any urban schoolyard with a gate that is left open to the public (such as the MVS Schoolyard) would have as its intended purpose and use activities that are quite different from and far more diverse than a suburban schoolyard that is closed to the public or otherwise limited, as the District says, "for use as a school and school-related functions." (Def. Br. i). Further, a "vast" (Def. Br. i) and "expansive" (See District's Statement of Material Facts ("DSF"), ¶ 24) schoolyard with sensor controlled lighting (such as the MVS Schoolyard) would have as its intended purpose and use something that is quite broader than a small schoolyard with no lighting. And a schoolyard with a gate permitting vehicles to enter with an area designated for vehicular parking as well as surveillance cameras (such as the MVS Schoolyard) would have different purposes and uses than a schoolyard with no vehicular gate, no parking, no surveillance cameras, and nothing other than playground equipment in it. The broad public use of the MVS Schoolyard is confirmed at PSF ¶¶ 11-15 and, in particular, in the Cowans and Stevens Certifications (PSF ¶ 15(f) and (g)). On this basis alone summary judgment must be denied.

The following facts are relevant and material to the purpose and use of the Schoolyard on the night of the Attacks as well as the scope of the District's obligation to "protect against" users of the Schoolyard from any dangerous property conditions:

i. The MVS Schoolyard is "vast," has lights, surveillance cameras, spaces for parking, basketball courts, and playground

equipment including a jungle gym and monkey bars. (Def. Br. 3). On the night of the Attacks, as well as on virtually all other days and nights for years prior to the Attacks, the Gate was left wide-open to the public in disregard of warnings and complaints to keep the Gate closed and despite MVS's claimed concerns for the safety of persons in the Schoolyard. (PSF ¶¶ 20-31).

ii. Less than two weeks before the Attacks Newark Councilman Ronald Rice, in a Memo sent to Superintendent Bolden and District Facilities Director Morlino, warned that the Schoolyard Gate was being regularly left open and that unless the Schoolyard Gate was locked there was a "crime waiting to occur." But Bolden and everybody else in the District ignored the ominous warning from Councilman Rice. (PSF ¶ 21(a), 26).

iii. Less than two hours before the Attacks an officer of the District's Roving Security Patrol (Def. Br. 6), Mr. Onwuzuruike, while patrolling MVS, saw that the Gate was open but did nothing about it in violation of the District's Security Policy concerning schoolyard gates. (PSF ¶ 28).

iv. Both the District's experts, Donald Decker, and Plaintiffs' expert, Randy Atlas, agree that the failure to close and lock the Schoolyard Gate contributes to criminal activity. If the Gate had been closed and locked, as it was supposed to be, neither the Plaintiffs nor any other member of the public could have entered the Schoolyard in a vehicle on the night of the Attacks. (PSF ¶ 30-31).

In driving into the Schoolyard, as any member of the public could have, Plaintiffs unknowingly entered a "death trap," and not the "safe haven" the Schoolyard was intended to be, according to District Advisory Board Chairman Gonzalez. The District's failure to "protect against" the dangerous property conditions in the Schoolyard, in light of the known history of criminal and gang activity in and around the Schoolyard, created the perfect venue for the commission of the horrific Attacks. For example,

i. From on or before June 3, 2007 up to and including the evening of August 4, 2007 (the night of the Attacks) the two Schoolyard surveillance cameras had been continuously

broken, inoperable, and left visibly dangling from wires. Yet no one, in violation of MVS and District policies, took any action of any kind to repair or otherwise "protect against" the broken surveillance cameras (PSF ¶¶ 33-48);

ii. Before and on the night of the Attacks the Schoolyard was poorly lit due to broken lighting that had remained unrepaired or otherwise protected against for a lengthy period of time prior to and on the night of the Attacks, in violation of MVS and District policies (PSF, ¶¶ 49-64);

iii. Before and on the night of the Attacks the fence surrounding the Schoolyard had two man-sized holes, located immediately adjacent to the high crime Ivy Hill Park Apartments side of the Schoolyard, that were not repaired or otherwise protected against in violation of MVS and District policies. The holes in the fencing created a quick pathway or getaway into and out of the Schoolyard for the criminal elements who occupied the Ivy Hill Park Apartments (PSF ¶¶ 65-72); and

iv. At some time prior to the night of the Attacks, the door to the school building in the sunken area of the Schoolyard, where three of the Victims were subsequently murdered, had several plainly visible bullet holes that had been ignored by MVS and the District, in violation of MVS and District policies. The District did not take any steps to "safeguard" or "warn" about the "bullet ridden" door (PSF ¶¶ 73-76).

Finally, completely omitted from the District's motion is any reference to the overwhelming evidence of criminal activity, vandalism and gang presence, in and around the Schoolyard, that the District actually knew about but took no action to "protect against," both prior to and at the time of the Attacks. (PSF ¶ 32). For example, at least as early as 1997, the District knew that the area surrounding the Schoolyard was "the site of several homicides, countless muggings, and continual drug dealing . . . ." Kuzmicz v. Ivy Hill Park Apartments, 282 N.J. Super. 513, 517 (App. Div. 1995). Further, between 2001 and June 2007, there were at least 26 reported criminal incidents at the MVS and Schoolyard (PSF ¶ 32(a)), as well as numerous other unreported criminal incidents. (PSF ¶ 32(b)). According to the CAP Index, a

well known crime risk predictor, at the time of the Attacks MVS and the Schoolyard had a five times greater risk of a crime occurring as compared to state and national averages. (PSF ¶ 32(c)). Further, 25 - 27 percent of all murders committed in New Jersey in 2006 and 2007 were committed in Newark. (PSF ¶ 32(d)). This is, by far, the highest murder total for any city in New Jersey. Ibid. And the Ivy Hill Park Apartment complex has been well known, for years, by District and MVS officials to be a venue for gangs and other criminal activity, as conceded by the District's expert. (PSF ¶ 32(e)). Rather than protecting against these conditions, three of the Attackers were permitted to pose for pictures flashing MS-13 gang signs in the Schoolyard at some time prior to the Attacks. PSF ¶ 32(g)(xii) (Riccio Cert. Vol. I, Exhibit I[3]).

In the face of these compelling facts, the District has the temerity to blame the Victims for being victimized. The District says it is not to blame just because "something bad happened." (Def. Br. i). But "something bad" didn't just happen. Rather, the District facilitated the Attacks by providing the public with open access to enter a dangerous Schoolyard in the face of numerous warnings and complaints that the Schoolyard Gate should be closed and locked, most notably Councilman Rice's warning a mere two weeks before the Attacks. (PSF ¶¶ 21(a), 26). In short, the District knew the Schoolyard had a history of criminal activity and was gang infested, yet did nothing to "protect" public users of the Schoolyard from these dangers and nothing to protect the public against the dangerous property conditions in the Schoolyard.

The District says "[n]o court has ever come close to imposing 'dangerous condition' liability on a public entity for any circumstance approximating that of a plaintiff sustaining injuries after being attacked by a vicious gang while sitting on a stoop smoking cigars behind an elementary schoolyard at midnight on a weekend in the summer." (Def. Br. 10). To be accurate,

[3] Citation to (Riccio Cert. Vol. __, Exhibit __) refers to the three volume Certification of Ronald J. Riccio, Esq., with exhibits, submitted herewith.

what the District should be saying to the Court is that no court has ever granted a motion for summary judgment that "comes close" to what the District's motion wants this Court to do.

PLAINTIFFS' COUNTER-STATEMENT OF FACTS

Plaintiffs' Counter-Statement of Facts are set forth in detail in Plaintiffs' Response to the District's Statement of Alleged Undisputed Facts submitted herewith. Here is a summary.

The District's entire argument is based on the legal conclusion that the Victims did not use the Schoolyard with "due care" because they were not engaged in a "school or after-school related" activity on the night of the Attacks. (Def. Br. 20). The factual premise of the District's legal conclusion is that the Schoolyard was not open to public use but was closed and limited to school-related use. This factual premise is completely contradicted by the Cowans and Stevens Certifications. (PSF ¶ 15(f) and (g)).

The fact is MVS and the District's Security Patrol had a policy to close and lock the Schoolyard Gate. (PSF ¶¶ 17-18). On the night of the Attacks the Schoolyard Gate, had the policies been followed, would have been closed. Further, the District had been warned just two weeks before the Attacks to close and lock the Gate. (PSF ¶ 21(a)). Had the Gate been closed the Victims could not have driven their vehicle into the Schoolyard, the Attacks could not have occurred, and three young lives could have been saved and the survivor spared a life of pain and suffering. (PSF ¶¶ 30-31). Had the public, of which the Victims were members, been protected, or warned for that matter, against the dangerous property conditions present inside of the Schoolyard, the Victims would not have entered the Schoolyard and been attacked. However, the facts show that the Gate Closing Policies, for many years, had been ignored by the District and MVS as were the many warnings and complaints about the dangers of the Gate being constantly left open. (PSF ¶¶ 20-31). As a result, on the night of the Attacks the Gate was, as was the custom, left open (PSF ¶ 24) for the public to enter what became, on the night of August 4, 2007, a "killing field."

Once inside the Schoolyard the Victims, as any member of the public would have, encountered an array of dangerous conditions, enhanced by the outrageous history of criminal activities and gang infestation in and around the Schoolyard, that made the Schoolyard a perfect venue for the commission of violent crimes. The dangerous property conditions and history of criminal activity are described in detail at PSF ¶¶ 32-87.

LEGAL ARGUMENT

POINT I

THE DISTRICT'S MOTION FAILS TO SATISFY THE RIGOROUS REQUIREMENTS THAT NEED TO BE MET TO PERMIT THE GRANT OF A SUMMARY JUDGMENT AND DENY PLAINTIFFS OF THEIR RIGHT TO A TRIAL BY JURY

A. The Governing Summary Judgment Requirements

Irrespective of which party has the burden of proof at trial, the party moving for summary judgment always has the heavy burden of persuasion to show the court that it is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The showing required to be made by the District for it to obtain a summary judgment in its favor is that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom, could sustain a judgment in favor of the non-moving party." Id.; Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 538-42 (1995); Gray v. Caldwell Wood Products, Inc., __ N.J. Super. __, 2012 WL 1569785, at *2 (N.J. App. Div. May 7, 2012).

In deciding motions for summary judgment, "[t]he papers supporting the motions [must be] closely scrutinized and the opposing papers indulgently treated." Slater v. Director of Taxation, __ N.J. Tax. __, 2012 WL 1521863, at *4 (N.J. Tax Ct. Apr. 27, 2012). "It is critical that a trial court ruling on a summary judgment motion not 'shut a deserving litigant from his or her trial.'" Brill, 142 N.J. at 540 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17

N.J. 67, 77 (1954)). Thus, all reasonable inferences must be drawn against the moving party and in favor of the non-movant. If "reasonable minds could differ" as to the outcome of a particular claim, the motion must be denied. Paradise Park Homeowners Ass'n v. Riverdale Mgmt. Assoc., 404 N.J. Super. 309, 336 (App. Div. 2008).

It is not the court's function, when deciding a summary judgment motion, "to weigh the evidence and determine the outcome but only to decide if a material dispute of fact exist[s]." Gilhooley v. County of Union, 164 N.J. 533, 545 (2000); see also Petersen v. Township of Raritan, 418 N.J. Super. 125, 136 (App. Div. 2011). If the evidence presented arguably could "permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party," summary judgment must be denied. D'Amato v. D'Amato, 305 N.J. Super. 109, 114 (App. Div. 1997).

Summary judgment should not be granted if to do so "would constitute what is, in effect, a trial by pleadings and affidavits involving issues of fact" because summary judgment "is not a substitute for a full plenary trial." Thus, "summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super 488, 494 (App. Div. 1994).

B. The Appellate Division Disfavors And Regularly Reverses Trial Courts That Grant Summary Judgment In Favor Of Public Entities Where, As Here, Plaintiffs Have Shown That A Public Entity Has Owned Or Controlled A Dangerous Property In Violation Of The Liability Creating Provisions Of N.J.S.A. 59:4-2

The Appellate Division has repeatedly reversed courts that grant summary judgment in favor of public entities where a plaintiff has shown, as here, public entity liability for a dangerous property condition in violation of N.J.S.A. 59:4-2 of the Tort Claims Act. See Foster v. Newark Hous. Auth., 389 N.J. Super. 60 (App. Div. 2006) (reversing trial court grant of summary judgment in favor of public entity where plaintiff alleged he was injured due to a

combination of the public entity Housing Authority's failure to provide an operable lock for the front entrance of its building and the acts of a third party); Roe v. New Jersey Transit Rail Operations, 317 N.J. Super. 72 (App. Div. 1998), certif. denied 160 N.J. 89 (1999) (reversing trial court grant of summary judgment in favor of public entity where plaintiff alleged her daughter was raped due to the dangerous condition of public entity property created by an open gate combined with the criminal acts of a third party); Saldana, 275 N.J. Super. 488 (reversing trial court grant of summary judgment in favor of public entity where plaintiff alleged damage to his property had been caused by the acts of a public entity in failing to secure vacant public entity buildings even though fires were started in the public buildings by third parties); DiBartolomeo v. New Jersey Sports & Exposition Auth., A-2716-09T2, 2011 WL 519885 (N.J. App. Div. Feb. 16, 2011) (reversing trial court grant of summary judgment in favor of public entity where plaintiff alleged public entity's escalator was a dangerous property condition and plaintiff's use of the escalator was normal and reasonable.); Fitzgerald v. County of Sussex, No. A-1503-07, 2008 WL 5133546 (N.J. App. Div. Dec. 9, 2008) (reversing trial court grant of summary judgment in favor of public entity because rational jury could conclude the public entity was liable under N.J.S.A. 59:4-2 for posting an incorrect 90 degree curve sign immediately before an upcoming 135 degree curve in the road); DiMatties v. Somerdale Park School, No. A-3769-08, 2010 WL 1424969 (N.J. App. Div. Apr. 8, 2010) (holding summary judgment was not appropriate where plaintiff, a student, slipped and fell on a public entity's school property). The Supreme Court recently recognized that the liability of a public entity for locking a gate raised issues of fact for a jury to resolve. Ogborne v. Mercer Cemetery Corp., 197 N.J. 448 (2009).

In statements that are particularly apt here, the Court in Roe wrote: "the bolting open of the gate (like the District's routine failure to close the Schoolyard Gate despite warnings and

complaints to do so) could be construed by the finder of fact as an invitation by [public entity] NJ Transit to the public to venture into a dangerous area." Roe, 317 N.J. Super. at 78. In Foster the court said: "Unquestionably, a jury could find that the failure to provide a lock for the front entrance of a building (like the District's routine failure to lock the Schoolyard Gate) was a dangerous condition of the property." Foster, 389 N.J. Super. at 68. In Ogborne the Court wrote that "it is reasonably debatable that the locking of the gates rendered the Park a dangerous condition . . . ." Ogborne, 197 N.J. at 461.

C. The Supreme Court And Appellate Division Disfavor Summary Judgment Being Granted By Trial Courts In Favor Of Public Entities Where, As Here, The Issue To Be Decided Involves The Due Care Exercised By The Property User

In Vincitore v. New Jersey Sports & Expo. Auth., 169 N.J. 119 (2001), the Court set forth the governing standards applicable to this case. First, "[w]hether property is in a 'dangerous condition' is generally a question for the finder of fact." Id. at 123. Thus, the District's statement that a "due care" determination "presents a legal rather than factual issue" is wrong. (Def. Br. ii). Second, a court should not decide as a matter of law whether a plaintiff who has been injured as a result of dangerous property conditions on public property exercised due care unless the evidence shows that the nature of the use of the public property by the property user was "so egregiously unreasonable that the injury had little or nothing to do with the condition of the property" (hereinafter referred to as the "egregiously unreasonable standard"). Id. at 126-127.

The "egregiously unreasonable standard" enunciated in Vincitore, and which governs here, has resulted in summary judgment motions being denied in cases where, as here, public entities have moved for summary judgment based on the claim that a plaintiff did not use the public property with due care. See Labaw v. County of Mercer, A-4677-05T5, 2007 WL 763312

(N.J. App. Div. March 15, 2007) (expert report, such as the expert report relied on here by Plaintiffs at PSF ¶ 30, was sufficient to create fact issue for summary judgment purposes as to the due care use by plaintiff of a van owned by a public entity); DiBartolomeo, 2011 WL 519885 (reversing trial court grant of summary judgment in favor of Sports Authority where plaintiff's use of escalator did not fall below due care); See also Lisowski v. New Jersey Transit, 2008 WL 4648396 (N.J. App. Div. Oct. 10, 2008) (applying the Vincitore "egregiously unreasonable standard" to deny a motion for a new trial because a fact finder could conclude plaintiff's use of public entity property was not "egregiously unreasonable").

POINT II

THE DISTRICT HAS FAILED TO SUSTAIN ITS HEAVY BURDEN OF SHOWING THAT AS A MATTER OF LAW PLAINTIFFS USE OF THE SCHOOLYARD WAS SO EGREGIOUSLY UNREASONABLE THAT THE INJURY HAD LITTLE OR NOTHING TO DO WITH THE CONDITION OF THE PROPERTY

A. The Due Care Standard As An Element Of N.J.S.A. 59:4-2

Pursuant to N.J.S.A. 59:4-2, a public entity has no immunity and is liable if damage is done to a person or property by the "dangerous condition" of public property. The elements of a claim under N.J.S.A. 59:4-2 are:

i. The existence of a dangerous condition;

ii. The condition proximately caused the injury;

iii. The condition created a reasonably foreseeable risk of the kind of injury incurred;

iv. The condition was either caused by a negligent employee or the entity knew about the condition; and

v. The entity's conduct was palpably unreasonable.

[See Vincitore, 169 N.J. at 125.]

Because the District has limited its motion to the "legal definitional issue as to what constitutes a 'dangerous condition' of public property under the New Jersey Tort Claims Act" (Def. Br. i), we will limit our response to the first element cited above, the existence of a dangerous property condition, and we will not address the remaining elements.

Pursuant to N.J.S.A. 59:4-1(a), a "dangerous condition" within the meaning of N.J.S.A. 59:4-2 is defined as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foresecable that it will be used." In Vincitore the Court articulated a three part legal analytical framework to determine whether a plaintiff has used public property with "due care":

> Step One: Determination of due care is generally a question of fact;
>
> Step Two: Did the property pose a danger to the general public when used in the normal foreseeable manner; and
>
> Step Three: Was the nature of the plaintiff's activity "so egregiously unreasonable that the injury had little or nothing to do with the condition of the property."
>
> [Vincitore 169 N.J. at 125-126 (emphasis added).]

In Ogborne, the Supreme Court added an overarching element to the "egregiously unreasonable" Vincitore standard. Ogborne directs that N.J.S.A. 59:4-2 be given a "broad reading" in favor of imposing liability on a public entity. Ogborne, 197 N.J. at 458. Thus, while the Tort Claims Act generally confers immunity, when the Act also imposes liability, as here, the scope of the liability created under the Act must be broadly construed.

B. The District Has Not Offered Any Facts, Much Less Admissible Evidence, To Sustain Its Burden Of Persuasion That Plaintiffs Did Not Use The Schoolyard With Due Care

Considering the District's rigorous burden of persuasion established in Vincitore, the District's legal argument is conclusory and wholly lacking in any factual support. For example, what set of facts has the District provided to show that as a matter of law the intended and foreseeable use of the Schoolyard on the night of the Attacks was for school-related purposes only? On what set of facts does the District rely to support its exceedingly narrow contention that this "vast" and "expansive" Schoolyard was only intended for limited "use as a school and school related functions," as opposed to being a "safe haven" gathering place for public use? (PSF ¶¶ 11-15). What set of facts has the District provided to show the general public was not allowed to use the Schoolyard and was not exposed to the same risk of attack as Plaintiffs? Or, that it is the Victims who are to be blamed for being victimized rather than the District's failure to "protect against" the dangerous conditions that it was warned of, knew about, but ignored? What set of facts has the District provided to show the nature of Plaintiffs' use of the Schoolyard was "so egregiously unreasonable" in relation to the nature of activities contemplated that the property conditions in the Schoolyard cannot reasonably be said to have caused Plaintiffs' injuries and deaths? The answers to these questions are self-evident. The District has provided no facts, only a self-serving, unsubstantiated (indeed wrong) legal conclusion.

While the District has produced nothing to support its naked legal conclusion, Plaintiffs have produced affirmative evidence that the Schoolyard's actual purposes and actual uses prior to the Attacks were as a safe haven/gathering place for the public. (PSF ¶¶ 11-15). This is confirmed, inter alia, by the statements of Advisory Board Chairman Gonzalez, Facilities Manager Morlino, and the Cowans and Stevens Certifications. At the August 21, 2007 Advisory

Board Meeting, held less than three weeks after the Attacks, Chairman Gonzalez affirmatively stated that the MVS Schoolyard was intended to be a "safe haven" left open for the public to use in the evening. (PSF, ¶ 11-15). Steve Morlino, the District's Facilities Director, testified that it was "very common that people go into schoolyards and play basketball in the evening, 'til all hours of the night" and that "most of the time, most of the principals encourage the lot or the playground to be used by the community after hours." Ibid.

For about eight years prior to the Attacks Cowans resided immediately adjacent to the Schoolyard. He describes the Schoolyard as being open to the public on nights and weekends, whether MVS was closed or not, and the public's use of the Schoolyard:

> i. people enter[ing] and exit[ing] the Schoolyard on foot through the broken fence on the Ivy Hill Park Apartment side of the Schoolyard and walk[ing] through the open Gate on Tuxedo Parkway;
>
> ii. kids and young adults playing basketball;
>
> iii. kids and young adults playing catch with a baseball;
>
> iv. kids and young adults playing catch with a football;
>
> v. people of all ages, including adults, from the community hanging out and having conversations;
>
> vi. people of all ages, including adults, from the community sitting on the bleachers and talking;
>
> vii. people of all ages, including adults, from the community driving their cars into the Schoolyard, exiting their cars and talking amongst themselves; and
>
> viii. high school age kids practicing their driving skills with an adult passenger."
>
> [Riccio Cert., Vol. II, Exhibit XX.]

Stevens, who has resided near MVS for over 20 years and has been a very active member of the local neighborhood association for over 18 years, corroborated the Cowans Certification. Riccio Cert. Vol. II, Exhibit YY. Stevens states: "Prior to the Attacks, the Gate was almost always left open on nights and weekends" and that "the Schoolyard was used by many people to hang out and converse . . . ." Ibid.

In essence, what the District asks this Court to conclude, as a matter of law, is that four law abiding, decent, hard-working, deeply religious, college students (Scheiman Cert.[4], at Exhibit A (¶2-28)) somehow were guilty of an "egregiously unreasonable" use of a Schoolyard routinely left open for the public to use because, shortly before returning to college near the end of summer break, they chose to lawfully drive their car through the open Gate to the Schoolyard on a hot summer evening to "chill," "hang out," and "sit on a stoop." (Def. Br. i). Such a legal conclusion has no factual support, defies common sense, is contradicted by the Cowans and Stevens Certifications, and is so contrary to the applicable law that it cannot possibly support the extreme outcome that would deny to Plaintiffs their right to a trial by jury.

C. On The Night Of The Attacks, The Facts Show That Plaintiffs' Use Of The Schoolyard Was Not "Egregiously Unreasonable" But Was Entirely Reasonable

The facts not mentioned by the District affirmatively show that the Victims' activities in the Schoolyard on the night of the Attacks were clearly reasonable and not "egregiously unreasonable" or, at a minimum, that there are myriad genuine issues of material facts with respect to Plaintiffs' due care. The complete material facts, rather than the incomplete snapshot relied on by the District, describing Plaintiffs' conduct in the Schoolyard on the night of the Attacks are set forth at PSF ¶¶ 88-127. For ease of reference, these paragraphs are quoted below:

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[4]Reference to the "Scheiman Cert." is the Certification of Eliyahu S. Scheiman, Esq. with exhibits, submitted with the District's Motion for Summary Judgment.

88. On the evening of August 4, 2007, Natasha and Terrance met with Iofemi and Dashon. Riccio Cert. Vol. I, Exhibit VV.

89. The Plaintiffs were set to return to (Iofemi was to begin at) Delaware State University for classes at the end of the month. See Riccio Cert., Vol. I, Exhibit TT (Plaintiffs' Response to District Interrogatory No. 55 and 75); Riccio Cert. Vol. II, Exhibit MM.

90. The Plaintiffs first went to get something to eat and then went to Vailsburg Park to sit, listen to music, and talk. Riccio Cert. Vol. I, Exhibit VV.

91. Around 10 p.m. Plaintiffs were asked by a police officer to leave Vailsburg Park because the park closed at 10 p.m. Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) 113:3 to 114:2).

92. Plaintiffs' discussed places they could go to continue spending time together. Natasha explained: "So then we trying to figure out, I'm like, so where we going to go y'all? Y'all have any suggestions? And nobody has any suggestions. And I'm, like, okay, so we're not going to keep riding around in circles, somebody come up with something. So then me and Iofemi just, like, had an epiphany, we was, like, oh, let's go to Mount Vernon. Okay, we'll go to Mount Vernon. And I was like – and we got up there . . . ." Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T115:19 to 116:3). She added: "[W]e had an epiphany because we're just thinking of places to go. We were just, like, 'Oh, yeah, we did go there before. Oh, okay, let's go to Mount Vernon. We'll go to Mount Vernon.'" Id. (T117:14-19). At the Godinez Trial, Natasha was asked:

"So you just wanted to enjoy each other's company?" She responded: "Right." Riccio Cert. Vol. III, Exhibit CC (Natasha (Godinez) T24:20-22).

93. The Plaintiffs were not looking for a place where they would be alone. Natasha was asked: "Were you looking for a secluded spot?" She responded: "Not really. It wasn't, like, you know, we had to be by ourselves type of thing, no." Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T141:4-6).

94. When Plaintiffs arrived at MVS at approximately 10:30 p.m., Natasha drove her car into the Schoolyard from Tuxedo Parkway through the open Schoolyard Gate. Riccio Cert. Vol. I, Exhibit VV; Riccio Cert. Vol. III, Exhibit QQ (Natasha (Alfaro) T18:11-14).

95. Natasha noticed two males sitting on the bleachers. Riccio Cert. Vol. I, Exhibit VV. Natasha was asked at her deposition: "Were you bothered by the fact that other people were there?" She responded: "Just that they had the bleachers, but that's about it." Riccio Cert. Vol. III, Exhibit BB (Natasha T141:7-10). Natasha was "[k]ind of" disappointed they would have to sit on the stairs as opposed to the bleachers. Riccio Cert. Vol. III, Exhibit QQ (Natasha (Alfaro) T26:19-22).

96. She parked her car next to the Schoolyard bleachers in front of the stairs. Riccio Cert. Vol. I, Exhibit VV; Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T120:2-7). She was asked at the Alfaro Trial: "And why ah, did you go there as opposed to any other spot in the parking lot?" She responded: "Because the bleachers were right there and the steps is right there." She was then asked:

"And what was important about that?" She responded: "We could sit down." Riccio Cert. Vol. III, Exhibit QQ (Natasha (Alfaro) T23:1-6).

97. Natasha, Iofemi, and Dashon sat down on the stairs in front of Natasha's car and listened to music. Riccio Cert. Vol. I, Exhibit VV.

98. The music was playing on Natasha's car radio. Riccio Cert. Vol. III, Exhibit QQ (Natasha (Alfaro) T27:23 to 28:1).

99. Dashon was dancing. Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T124:21-25).

100. Iofemi was eating food. Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T128:10-12).

101. The three were sharing a "Black and Mild" tobacco filled, cigarette-like "cigarillo." Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T128:15 to 129:8).

102. Terrance walked over to the monkey bars, which were approximately 100 feet away from where the car was parked. Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T126:6-11); Riccio Cert. Vol. III, Exhibit QQ (Natasha (Alfaro) T28:23-25).

103. Plaintiffs had no concern for the two men sitting on the bleachers. Natasha testified: "[T]hey was drinking. They had a beer in they hand or whatever and they was looking like they was talking amongst themselves, smiling, you know, having conversation back and forth. We was just -- we was minding our business. Music was playing outside my car, I had my umm car

radio on. We wasn't paying them no mind." Riccio Cert. Vol. III, Exhibit CC (Natasha (Godinez) T33:14-20).

104. The two men said something to Dashon in a funny, laughing manner. Riccio Cert. Vol. III, Exhibit CC (Natasha (Godinez) T33:23 to 34:1).

105. The two men offered the Plaintiffs' beer, but Plaintiffs declined. Natasha testified: "He actually like ah, offered something to use, like he was like young ha, ha ha, ha (sound), showed us the bottle and everything. Said no, we good." Riccio Cert. Vol. III, Exhibit CC (Natasha (Godinez) T34:10-12).

106. After a short while, Natasha received a text message at 11:30 p.m. from Terrance stating: "Itz tym 2 go." Riccio Cert. Vol. II, Exhibit W.

107. She responded, asking why. Before she received a reply she looked up and saw Terrance walking toward her. He had a very serious look on his face. Riccio Cert. Vol. I, Exhibit VV.

108. Natasha then noticed that four young males had entered the Schoolyard, crossing in front of Terrance to join up with the two older males who had been sitting on the bleachers. Riccio Cert. Vol. I, Exhibit VV.

109. Natasha told Dashon and Iofemi to get in the car. She told Terrance to drive. Riccio Cert. Vol. I, Exhibit VV.

110. When the Plaintiffs tried to get into the car, the Attackers quickly surrounded them. They pointed one or more guns at the Plaintiffs. Riccio Cert. Vol. I, Exhibit VV.

111. The Plaintiffs were ordered to get on the ground, face down, and hand over all of their belongings. Natasha was face down on the ground, adjacent

to the front passenger door. Iofemi was face down, adjacent to the rear passenger door. Riccio Cert. Vol. I, Exhibit VV.

112. One of the Attackers ripped off Natasha's necklace from around her neck and took her cell phone. Natasha saw Iofemi give the Attackers her money. Dashon handed over his cell phone. Riccio Cert. Vol. I, Exhibit VV.

113. After taking the Plaintiffs' belongings, the Attackers entered Natasha's car. Natasha thought they were going to steal the car and leave. Riccio Cert. Vol. I, Exhibit VV.

114. The Attackers got out of the car. Natasha glanced to her left and saw the Attackers pulling Iofemi's pants down. Riccio Cert. Vol. I, Exhibit VV.

115. Two Attackers then pulled Natasha's pants down, inserted their fingers into her vagina with force, and made sexually degrading comments. Riccio Cert. Vol. I, Exhibit VV.; Riccio Cert. Vol. III, Exhibit DD (Natasha (Carranza) T44:7 to 45:12).

116. Natasha prayed aloud, "Jesus, Jesus, Jesus." The Attackers yelled at her: "Shut the fuck up." Riccio Cert. Vol. I, Exhibit VV.

117. Natasha could see from under the car her brother Terrance and Dashon being taken to the front of the car and down steps to a sunken area of the Schoolyard. Riccio Cert. Vol. I, Exhibit VV.

118. Then one of the Attackers jammed a knee in Natasha's back to hold her down. She felt something hitting her neck. She turned her head slightly and could see that she was being struck in the back of her neck with what looked

like a machete. She then saw blood pour from her wound. Riccio Cert. Vol. I, Exhibit VV.

119. Natasha attempted to stand up and get the Attacker off her back. She screamed, "Don't do that, don't do that, why are you doing this?" Riccio Cert. Vol. I, Exhibit VV.

120. While this was taking place, Iofemi, Dashon, and Terrence were in the sunken area of the Schoolyard also pleading for their lives. Shahid Baskerville, one of the Attackers assaulting Natasha on the upper level of the Schoolyard, was asked: "When you were with [Natasha] could you hear the people down the stairs?" He responded: "Yes." He was asked: "What did you hear?" He responded: "Voices and they were sayin' 'stop; what are you doing?'" He was then asked "How loud were the voices?" He responded: "They were loud." He was then asked: "And where were those voices comin' from?" He responded: "The lower level." Riccio Cert. Vol. III, Exhibit NN (Baskerville (Carranza) T42:2-13).

121. Natasha then heard two gun shots coming from the sunken area where Terrance and Dashon had been taken. Riccio Cert. Vol. I, Exhibit VV.

122. Natasha immediately turned and saw an Attacker standing approximately five feet away from her. He pointed a gun directly at her face. The Attacker looked over towards the sunken area. He then looked back at Natasha and pulled the trigger. Natasha fell to the ground, suffering a near fatal gun shot to her head. Riccio Cert. Vol. I, Exhibit VV.

123. At the time of the Attacks, Michael Yancey was on the third floor of a house adjacent to the Schoolyard. He heard a woman say: "Please, why you want to do that?" He explained the woman's tone as follows: "It was like begging for mercy . . . ." He then heard a woman say: "Don't do that, why you want to do that?" He explained that this time the woman spoke "[l]ike she had anger." Riccio Cert. Vol. III, Exhibit EE (Yancey T14:8 to 16:10).

124. A few minutes later Mr. Yancey heard four gunshots. Riccio Cert. Vol. III, Exhibit EE (Yancey T17:3-11). He then called 9-1-1. Id. (Yancey T24:18-22).

125. The 9-1-1 call came in at approximately 11:40 p.m. Riccio Cert. Vol. III, Exhibit HH (Graham (Godinez) T7:3-22).

126. Thus, the Attacks lasted approximately ten minutes. PSF ¶¶ 106-125.

127. Natasha testified: "[T]hey say in criminal court that this thing took 10 minutes. To me it felt like forever." Riccio Cert. Vol. III, Exhibit BB (Natasha (Dep.) T152:11-13).

The foregoing facts show that, even without the benefit of all reasonable inferences to which Plaintiffs are entitled in connection with their opposition to the District's motion, the following conclusions in favor of Plaintiffs can reasonably be drawn by a jury with respect to Plaintiffs due care use of the Schoolyard:

i. Any member of the public who entered the Schoolyard on the night of the Attacks could have and would have been victimized in the same manner as Plaintiffs because the Schoolyard posed the exact same danger to the general public as it did to the Plaintiffs;

ii. Plaintiffs used the Schoolyard for its intended use as a safe gathering place left open to the public. As District Advisory Board Chairman Gonzalez admitted, "the Schoolyard is a 'safe haven' so that youngsters can go back there and play during the day, in the evening, you know"; and

iii. The Schoolyard's use was not limited to school or school-related functions and the District knew it, as evidenced by the Cowans and Stevens Certifications.

D. The Cases Relied On By The District To Support The Argument That Plaintiffs Did Not Use The Schoolyard With Due Care Are Factually And Legally Inapposite

(i) The Cases Relied On By The District Are Factually Distinguishable

The cases relied on by the District to support its motion are factually inapposite. The District argues, for example, that when Plaintiffs used the Schoolyard to hang out it somehow is the same or similar to someone who is injured while using the Atlantic City boardwalk as a diving platform to dive into neck high ocean water (Def. Br. 11), or a person who gets hurt using a bridge as a diving board into shallow water (Def. Br. 12), or a person who is killed making unauthorized use of railroad tracks (Def. Br. 12). No reasonable person can possibly conclude that when the Victims lawfully gathered together and sat on a set of steps in the Schoolyard that was regularly left open to the public, it was an "egregiously unreasonable" use of that property comparable to using a boardwalk or bridge as a diving board, or playing on railroad tracks. Yet, this is the District's argument.

The other cases relied on by the District are also factually inapposite to the conduct of Plaintiffs and further demonstrate the absurdity of the District's argument. In Garrison v. Township of Middletown, 154 N.J. 282 (1998), the plaintiff was playing touch football at night on a dimly lit and uneven surface of a municipal parking lot that was used for train patrons. In Bartell v. Polos Verdes Peninsula Sch. Dist., 147 Cal. Rptr. 898 (Cal. Ct. App 1978), plaintiff was skateboarding in a schoolyard while engaged in a dangerous activity known as "crack-the-

whip." Plaintiffs' use of the Schoolyard cannot reasonably be seen to equate to such extreme misuses of property.

(ii) The Cases Relied On By The District To Support Its Motion For Summary Judgment Are Not Only Factually Inapposite But Are Also Of Slight, If Any, Precedential Value

The cases relied on by the District to support the grant of a summary judgment (Garrison, Burroughs, Levin, Daniel, Lopez, and Hawes at Def. Br. 11-22) were all decided prior to the Supreme Court decisions in Vincitore and Ogborne. In Ogborne, the Court directed that the dangerous property liability imposed on a public entity under the Tort Claims Act must be liberally construed. And in Vincitore the Supreme Court modified Garrison and specifically distinguished the Appellate Division decisions in Hawes and Lopez that are relied on by the District to support its motion as if the Vincitore comments on those cases was never written. Thus, the pre-Vincitore cases relied on by the District to support this motion, are of limited, if any, precedential weight due to the subsequent articulation of the "egregiously unreasonable" standard in Vincitore and the liberal reading of N.J.S.A. 59:4-2 that is mandated by Ogborne. See Lisowski, 2008 WL 4648396 (citing Vincitore and, in particular, the requirement that "plaintiff's behavior" must be "so egregiously unreasonable that the injury had little or nothing to do with the condition of the property.").

(iii) On The Night Of The Attacks The Schoolyard Had Several Dangerous Property Conditions That Combined With And Were Enhanced By Foreseeable Criminal Acts Of Third Parties

There's a reason the District does not want the Court to scrutinize the dangerous property conditions that existed in the Schoolyard on the night of the Attacks. The reason is obvious, the facts overwhelmingly support the conclusion that on the night of the Attacks the Schoolyard had

multiple dangerous property conditions that the District was warned of and knew about, yet outrageously did nothing to protect against.

Gates located on public property have been held to be dangerous property conditions. See Ogborne, 197 N.J. at 461 ("[i]t was the combination of the plaintiff being in the publicly-owned park and the public entity's employee locking the gates that rendered the park potentially dangerous to plaintiff"); Vincitore, 169 N.J. at 127 (concluding that the trier of fact could reasonably have found that the defendant public entity had created a dangerous condition by leaving the chain-link gates guarding a railroad crossing on its property open and unattended when it knew that the people who normally used the crossing regarded the open gates as a signal that it was safe to cross the tracks); Roe, 317 N.J. Super. at 74-75 (finding that an unlocked gate which permitted members of the public to enter a high crime area could be a dangerous condition). See also Speaks v. Hous. Auth. of the City of Jersey City, 193 N.J. Super. 405 (App. Div. 1984) (finding that a half-missing stairwell window in a publicly owned building through which a bicycle could be thrown was a dangerous property condition); Smith v. Fireworks by Girone, Inc., 180 N.J. 199, mod. on clarification, 182 N.J. 138 (2004) (observing that a live firework in a public park was a dangerous property condition); Posey v. Marken, 171 N.J. 172 (2002) (concluding that an integrated publicly-owned drainage system that artificially increased the depth of water immediately downstream from a culvert was a dangerous property condition).

Where criminal activities occur at or near dangerous public property, the criminal acts, as a matter of law, have been held to combine with and enhance the dangerousness of the physical property conditions. This is true of the Attacks that occurred here in light of the extensive evidence of criminal activity in and around the Schoolyard. See Speaks, 193 N.J. Super. 405 (dangerous property condition was failure to replace upper window frame in public building

combined with and enhanced by the acts of third party who threw bike out window); Saldana 275 N.J. Super. 488 (dangerous property condition was vacant public buildings combined with and enhanced by the acts of arsonists); Roe, 317 N.J. Super. 72 (dangerous property condition was open gate on public property combined with and enhanced by the act of a rapist); Foster, 389 N.J. Super. 60 (dangerous property condition was unlocked front entrance to public building combined with and enhanced by the act of third party who shot plaintiff).

The California Tort Claims Act, Cal. Gov't Code §810, et seq., serves as the model for the New Jersey Tort Claims Act. California decisions are considered to be "especially persuasive." Civalier v. Trancucci, 138 N.J. 52, 66-67 (1994). The following California cases are "especially persuasive" authority that support denial of the District's motion. See Swaner v. City of Santa Monica, 150 Cal. App. 3d 789 (Cal. App. 2 Dist. 1984) (dangerous property condition was lack of barrier or fence separating the beach from the parking lot combined with acts of third parties who improperly raced motor vehicles on site); Matthews v. State, 82 Cal. App. 3d 116 (Cal. App. 5 Dist. 1978) (dangerous property condition was malfunctioning traffic lights in a busy intersection combined with act of negligent driver); Slapin v. Los Angeles Int'l. Airport, 65 Cal. App. 3d 484 (Cal. App. 2 Dist. 1977) (dangerous property condition was dimly lit parking lot owned by the city combined with criminal acts of third parties); Curreri v. City and County of San Francisco, 262 Cal. App. 2d 603, 612 (Cal. App. 1 Dist. 1968) (dangerous property condition was a city street curb which did not comply with height specifications combined with act of third party driver).

The dangerous Schoolyard property conditions that created a substantial risk of injury to the Plaintiffs on the night of the Attacks and which the District outrageously failed to "protect against" are described in detail at PSF ¶¶ 16-87, and are summarized below:

i. The Gate to the MVS Schoolyard was routinely left unlocked and wide open despite warnings and complaints, as well as in violation of the school's and District Security Patrol's Gate Closing Policy, thus providing an invitation to all members of the general public to enter the Schoolyard by vehicle or on foot and to use the Schoolyard for public purposes including as a safe haven/gathering place;

ii. The two exterior Schoolyard surveillance cameras located at or near the area of the Attacks were broken and remained unrepaired since at least June 3, 2007, and perhaps for many months before;

iii. The Schoolyard was poorly lit because some lights had either been intentionally rendered inoperable or were damaged, and had not been repaired in a timely manner;

iv. Perimeter fencing around the Schoolyard had man-sized holes that had not been repaired in a timely manner, thus making the Schoolyard a pathway or providing a quick getaway for the criminal element who occupied the high crime Ivy Hill Park Apartments;

v. The Schoolyard's sunken area where three of the Victims were murdered was poorly lit, not monitored by cameras, was secluded from public view and sound, contained a door with bullet holes from a pre-Attack incident, and was a perfect venue for criminal activities; and

vi. There was a lengthy history of criminal activity of which the District for many years prior to the Attacks had actual knowledge, including the presence of street gangs in the Schoolyard and surrounding area that the District did nothing to "protect against." The criminal activities combined with and enhanced the dangerous property conditions in the Schoolyard.

[PSF ¶ 16-27.]

Dr. Atlas, Plaintiffs' security expert, has opined that the dangerous Schoolyard conditions were significant factors that caused Plaintiffs' injuries and deaths. The entirety of Dr. Atlas' report is located at Riccio Cert. Vol. II, Exhibit KK.

POINT III

THE DISTRICT HAS FAILED TO SUSTAIN ITS HEAVY BURDEN OF SHOWING THAT PLAINTIFFS CANNOT CONCURRENTLY ASSERT A CLAIM FOR THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The District argues that Count Five of Plaintiffs' Complaint should be dismissed because "a plaintiff is barred from simultaneously advancing a negligence-based and 'dangerous condition' claim against a public entity based on the same operative facts." (Def. Br. 22). The District, to support its argument, relies exclusively on Ogborne. The District's reliance on Ogborne is misplaced.

Count Five of Plaintiffs' Complaint is based on the severe emotional distress suffered by each of the Victims as a result of observing each other "being assaulted and sexually molested." Scheiman Cert., Exhibit A, ¶¶ 275-282. In particular, the Complaint asserts that Natasha has experienced "severe emotional distress as a result of observing the assault and execution of her brother, Terrance, as well as from the threat and/or imposition of physical harm." Scheiman Cert., Exhibit A, ¶¶ 279. Similarly, "prior to his execution," Terrance suffered "severe emotional distress as a result of observing his sister being assaulted and sexually molested, as well as from the threat and/or imposition of physical harm." Scheiman Cert., Exhibit A, ¶ 280. Count Five is commonly referred to as a "Portee Claim" because it derives from the Supreme Court's decision in Portee v. Jaffee, 85 N.J. 88 (1980). Portee allows a plaintiff to bring a claim and recover damages for the "emotional harm following the perception of the death or serious injury to a loved one . . . ." Id. at 101.

The District does not argue the merits or validity of Plaintiffs' "Portee Claim" but only that a claim brought under the Tort Claims Act cannot, as a matter of law, be brought concurrently with a "Portee Claim." To support its argument the District relies exclusively on

Ogborne. However, Ogborne has nothing to do with the question of whether a plaintiff can concurrently pursue a Tort Claims action and a "Portee Claim."

In Ogborne, the Supreme Court was determining:

> [W]hether the ordinary negligence standard of N.J.S.A. 59:2-2 must give way to the more stringent "palpably unreasonable" standard of N.J.S.A. 59:4-2 when a public employee's negligent conduct causes a plaintiff to come into contact with a condition of property that causes his or her injury.
>
> [Ogborne, 197 N.J. at 459.]

There, the plaintiff was hurt when climbing over a perimeter wall when locked in a park. Id. at 452. The trial court found that the public entity was vicariously negligent as a matter of law for the conduct of a public employee acting within the scope of employment. Ibid. Because the claim was actually for the dangerous condition of public property, the Supreme Court held that "the higher standard of palpably unreasonable conduct in N.J.S.A. 59:4-2 operates to trump the ordinary negligence standard, which otherwise applies when the act of a public employee causes an injury." Id. at 460.

What the District has done is take the narrow holding in Ogborne and tried to extend it to preclude "Portee Claims" that are brought concurrently with a dangerous property condition claim under N.J.S.A. 59:4-2, but Ogborne does not even remotely support the District's argument. The Ogborne holding is directed at the situation where a plaintiff is trying to avoid application of the "palpably unreasonable" standard by transforming a dangerous property condition claim under N.J.S.A. 59:4-2 into a simple negligence claim so as to avoid the "palpably unreasonable" standard. Here, Plaintiffs have alleged a dangerous property condition claim under N.J.S.A. 59:4-2, and we do not dispute that the "palpably unreasonable" standard applies.

The District has not cited any case holding that a "Portee Claim" is barred by the immunities conferred under the Tort Claims Act. The existing case law suggests otherwise. In Ayers v. Jackson Twp., 106 N.J. 557 (1987), the Supreme Court held that "tortiously inflicted emotional distress" was a recognized injury "under the [TCA] statute." Id. at 577; Srebnik v. State, 245 N.J. Super. 344, 349 (App. Div. 1991). In Srebnik, the Appellate Division, in dicta, suggested the Portee Claim could not be brought under the Tort Claims Act, when it noted that the TCA "does not expressly or impliedly exempt Portee claims, notwithstanding the laudable policy underpinnings of the Portee decision." Id. at 352-353. Nonetheless, the court affirmed the trial court decision to allow a jury to consider plaintiff's "Portee Claim" concurrently with another claim brought under the Tort Claims Act.

Plaintiffs are entitled to bring a "Portee Claim" and seek recompense, especially when Natasha continues to suffer from flashbacks of the Attacks, and continues to suffer from severe headaches three or four times a week, along with anxiety, depression, fatigue, insomnia, difficulty concentrating, and loneliness, not only from the Attack on her, but the murder of her brother, Terrance, and her friends (all of whom she loved), that she personally witnessed. Scheiman Cert., Exhibit A (¶¶ 2-28). According to Dr. Ralph G. Oriscello, a trauma surgeon, Natasha suffers from post-traumatic stress disorder. (PSF ¶ 149). She has been forced to live with the vivid and painful memories of the last moments she spent on earth with her beloved brother and two best friends. The "enormity of [her] psychic scar," according to Dr. Oriscello, "cannot be overemphasized." Ibid.

Dr. David J. Gallina, a neuropsychiatrist, has also diagnosed Natasha as suffering from post-traumatic stress disorder. (PSF ¶ 150). According to Plaintiffs' expert, Dr. Gallina, Natasha "has experienced both physical and emotional trauma that has disrupted her inner sense

of security, confidence and self-esteem in her daily life." Ibid. It is Dr. Gallina's opinion that long term treatment will be needed to help Natasha with the physical and emotional pain she continues to suffer. Ibid.

POINT IV

BOLDEN HAS FAILED TO SUSTAIN HER HEAVY BURDEN OF SHOWING THAT INDIVIDUAL LIABILITY SHOULD NOT BE IMPOSED

The District does not dispute that the Tort Claims Act imposes individual liability on a "public employee" "to the same extent as a private person." N.J.S.A. 59:3-1; Chatman v. Hall, 128 N.J. 394 (1992). Just as a public entity is not immune from suits based on dangerous property conditions, so too is a public employee not personally immune.

What the District argues is that because, as a matter of fact, Bolden did nothing wrong then the Complaint against her should be dismissed "with prejudice." But whether Bolden's actions and inactions were palpably unreasonable or not are questions of fact for the jury, not the judge, to decide. See Vincitore, 169 N.J. 119; Ogborne, 197 N.J. 448. In any event, a jury can, and we believe will, conclude that Bolden's actions were palpably unreasonable. If Bolden is found to be personally liable she will likely be indemnified by the State under N.J.S.A. 59:10-2.

The facts show that at all times up to and including the date of the Attacks Bolden, as the State-appointed Superintendent, was personally in full control of MVS and the Schoolyard. She was the person in charge of the day-to-day operations of the District and her powers as the District's State-appointed Superintendent and State Officer were pervasive and included:

- The power to fire any tenured building principal or vice-principal for: (a) inefficiency; (b) incapacity; (c) unbecoming conduct; or (d) other just cause as defined by criteria set forth by the Commissioner. N.J.S.A. 18A:7A-45(c).

- The power to reorganize the District's central administrative and supervisory staff, and the power to evaluate all individuals employed in the central administrative and supervisory staff positions. N.J.S.A. 18A:7A-44(b).

- The power to abolish the positions of chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel. N.J.S.A. 18A:7A-44(a).

- The power to assume all of the duties and powers of the former local superintendent of schools, the secretary of the Newark Board of Education, the school business administrator, the school business manager, as well their respective assistants and clerks. N.J.S.A. 18A:7A-35(d).

- The power to make, amend and repeal district rules, policies and guidelines, not inconsistent with law for the proper conduct, maintenance and supervision of the schools in the district. N.J.S.A. 18A:7A-35(f).

- The power to: (1) enforce the rules of the State Board; and (2) perform all acts and do all things, consistent with law and the rules of the State Board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. N.J.S.A. 18A:7A-38.

- The power to appoint, transfer and remove clerks. N.J.S.A. 18A:7A-42(a)(1).

- The power, with the Commissioner's approval, to appoint and set the salaries of as many State assistant superintendents as the Superintendent deems necessary, assigning them their duties and responsibilities. N.J.S.A. 18A:7A-42(a)(2).

- The power, with the Commissioner's approval, to make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional. N.J.S.A. 18A:7A-42(a)(3).

- The power to delegate to subordinate officers or employees in the District any of the Superintendent's powers and duties as the Superintendent may deem desirable to be exercised under the Superintendent's "supervision and control." N.J.S.A. 18A:7A-42(b).

- The power to establish an assessment unit to conduct on-site evaluations of each building principal and vice-principal consistent with criteria set forth by the Commissioner. N.J.S.A. 18A:7A-45(b) and (c).

- The power to propose capital projects to the Capital Project Control Board. N.J.S.A. 18A:7A-46.1(a) and 46.2.

- The power to develop the school district's budget. N.J.S.A. 18A:7A-50.

During her deposition, Bolden also made the following admissions:

- When the State took over the District, the existing Newark Board of Education was terminated and the State-appointed Superintendent appointed members to its replacement "Advisory Board." (Bolden T169:12).

- With regard to the Advisory Board's power: "Early on I could have vetoed anything . . . Then they began to vote on issues of finance. Never personnel." (Bolden T168:16-23).

- As a State officer in control of the Newark Public Schools, she took the following actions:

    - Transferred or dismissed "probably a dozen" principals and "possibly more" vice principals. (Bolden T163:20-21).

    - Made the final decision on the hire of a new principal or vice principal. (Bolden T164:3-9).

    - On "many" occasions transferred or dismissed teachers. (Bolden T166:8).

    - Dismissed custodians and facilities workers. (Bolden T166:10-23).

    - Created policies for the District. (Bolden T168:9-23).

[Riccio Cert., Vol. III, Exhibit A]

Bolden not only was the individual who was personally in charge of the District and the MVS Schoolyard, but she is also the person who outrageously ignored the Rice Memo warning her and her Facilities Manager, Steve Morlino, a mere two weeks before the Attacks, to "provide

a new lock to the gate at Mt. Vernon School on the Tuxedo Parkway side as it may be a potential location for illegal activity or a crime waiting to occur." (PSF ¶ 21(a)). A jury could reasonably conclude, and we expect will conclude, that Bolden's blatant failure to lift a finger in response to the Rice Memo was palpably unreasonable. Had Bolden done anything in response to the Rice Memo the Attacks could not have happened because the Gate through which the Victims entered the Schoolyard would have been closed and locked. Bolden's outrageous failure to pay heed to a conscientious Councilman's warning turned out to be life-altering for Natasha and life-ending for the other Victims.

Here is a summary of the undisputed facts concerning the Rice Memo that help to trigger Bolden's personal culpability in connection with the Attacks. (PSF ¶ 21(a)). Councilman Rice testified that his Memo was sent as a result of a meeting he had with the Tuxedo Parkway Block Association, less than two weeks before the Attacks, wherein he was told that the Tuxedo Parkway Block Association feared "that something bad could happen" if the Gate remained unlocked and open. (Id. (Rice T15:6-7)). Rice testified: "Because it was dark you couldn't really look out your window to even see what was going on there, but they felt that there were a number of potential gang members that would be there, that there was potentially gang initiations that were going on there, that there were potentially, again, it was a meeting place because it was so remote and so black in terms of its secrecy, that, that was – potentially something bad could happen there." (Id. (Rice T15:15-25 to 16:1-4)). Rice said the residents believed the Schoolyard "was a potential location for illegal activities . . . particularly a crime waiting to happen or occur." (Id. (Rice T18:20-23)).

According to Rice, the "residents actually brought me to the [G]ate to show me that it was open at the time of the actual block party to illustrate it, sort of in my face, and say this is

open, and I asked if it was always open. They said pretty much." (Id. (Rice T14:2-7)). "[T]hey kept saying, Councilman, the [G]ate needs to be secured, if nothing else. Forget the lighting, forget the cameras. If nothing else, the [G]ate needs to be secure, and because there was [sic] so many people on the block who kept saying that was an issue on a regular, is why I immediately, you know, left that location and went to City Hall to put in a request to do something there." (Id. (Rice T16:5-13)).

Proof that Bolden ignored Councilman Rice's Memo is evidenced by the fact that the following top District officials admitted that Bolden had not even bothered to make them aware of the Memo prior to the Attacks: (i) District Security Director Freeman (Freeman T307-310); (ii) District Security Supervisor Horton, who supervises the District Security Patrol (Horton T145); (iii) District Security Patrolman Onwuzuruike, who performed a routine check of MVS at 9:37 p.m. on August 4, 2007, less than two hours before the Attacks (Onwuzuruike T56-57); (iv) District Custodial Supervisor Woody (Woody T110); (v) MVS Summer School Principal Lee (Lee T65-66); (vi) MVS Head Custodian Monroig (Monroig T107:17-21); (vii) MVS Head Custodian Hatcher (Hatcher T120-121); (viii) MVS Substitute Head Custodian Stewart (Stewart T58); and (ix) MVS Custodian Burks (Burks T50:25 to 52:8). (PSF ¶ 26).

Bolden's failure to address the presence of gangs in the Schoolyard is another factual basis for imposing personal liability. In 2005, Bolden instituted a policy by which school principals were to be trained to recognize and remove gang graffiti. If a gang symbol was recognized the Principal was supposed to call the Gang Task Force of the Newark Police Department. (PSF ¶¶ 77-78). Gang graffiti, in particular, is a danger sign because, according to the District's expert, it provided notice of a gang turf war. (PSF ¶ 82).

Prior to the Attacks the Schoolyard had evidence of "conflict graffiti." (PSF ¶ 83). Despite Bolden's enactment of a gang graffiti recognition and removal policy she did nothing to follow through to ensure that the policy was implemented. (PSF ¶ 85-87). Perhaps the best evidence of Bolden's nonfeasance as to her gang graffiti policy is that at some time prior to the Attacks, three of the six gang members who subsequently participated in the Attacks felt so "at home" in the Schoolyard that they posed for a photo in the Schoolyard, flashing MS-13 gang signs, at the location where the Victims were subsequently attacked by these very persons and others. (Riccio Cert. Vol. I, Exhibit I).

In light of Bolden's power as State-appointed Superintendent of the District, together with her palpably unreasonable acts of misfeasance and nonfeasance in response to the Rice Memo and the known gang presence in the Schoolyard, the District's argument that "there are no allegations or evidence" against Bolden sufficient to impose personal liability is specious.

CONCLUSION

Based on the foregoing, the Court should deny the District's motion for Summary Judgment.

McElroy, Deutsch, Mulvaney & Carpenter, LLP
Attorney for Plaintiffs

By: _____
Ronald J. Riccio

Dated: June 5, 2012

MORGAN MELHUISH ABRUTYN
651 W. Mt. Pleasant Avenue
Livingston, New Jersey 07039-1673
(973) 994-2500
Attorneys for Defendants, State of New Jersey and State of New Jersey, Department of Education
Our File No.: STN 30-520 U EA/LL

NATASHA AERIEL, individually; RENEE TUCKER, individually and as Administratrix Ad Prosequendum and Administratrix for the Estate of Terrance Aeriel; SHALGA P. HIGHTOWER, individually and as Administratrix Ad Prosequendum and Administratrix Ad Prosequendum for the Estate of Iofemi S. Hightower; and JAMES HARVEY, individually and as Administrator Ad Prosequendum and Administrator for the Estate of Dashon Harvey,

Plaintiffs,

v.

STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK; MARION A. BOLDEN, in her capacity as the State District Superintendent of the Newark Public Schools; NEWARK BOARD OF EDUCATION; STATE OF NEW JERSEY; STATE OF NEW JERSEY DEPARTMENT OF EDUCATION; GERARD GOMEZ; JOSE LACHIRA CARRANZA; SHAHEED BASKERVILLE; RODOLFO GODINEZ; ALEXANDER ALFARO; MELVIN JOVEL; JOHN DOES 1-50; ABC ENTITIES 1-50; JOHN DOE PUBLIC EMPLOYEES 1-50; AND XYZ PUBLIC ENTITIES 1-50

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NO. ESX-L-4320-08

Civil Action

BRIEF IN SUPPORT OF DEFENDANTS, STATE OF NEW JERSEY AND STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION'S MOTION FOR SUMMARY JUDGMENT

MORGAN, MELHUISH, ABRUTYN
651 West Mount Pleasant Avenue,
Suite 200
Livingston, New Jersey 07039
(973) 994-2500
Attorneys for Defendants, State of New Jersey and State of New Jersey, Department of Education

LEONARD LEICHT, ESQ.
Of Counsel and On the Brief

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PRELIMINARY STATEMENT

This case arises out of the tragic murders of three young people, and the vicious assault of a fourth, in the schoolyard of the Mount Vernon Elementary School in Newark. The Plaintiffs in this matter are Natasha Aerial, the lone survivor of the attacks, and the families of Iofemi S. Hightower, Dashon Harvey, and Terrance Aerial. Plaintiffs have filed suit against the Newark School District; Marion A. Bolden in her capacity as the District Superintendent of the Newark School District; the Newark Board of Education (referred to collectively as the "Newark Defendants"); the State of New Jersey and the State Department of Education (collectively the "State Defendants"); the six individuals who have been charged in connection with the attacks (four of whom have been convicted, and two of whom are facing pending charges), and numerous fictitious defendants.

The crimes committed against Iofemi, Dashon, Terrance, and Natasha are shocking. However, terrible as the circumstances are, the State Defendants are not liable for the Plaintiffs' injuries, and therefore, the State Defendants are entitled to judgment as a matter of law.

Count I of Plaintiffs' Complaint alleges that the "public entity defendants," including the State Defendants, knew the schoolyard was an area of high crime and it was reasonably foreseeable a crime would occur there. The remaining Counts against the "public entity defendants," including the State Defendants, for negligent infliction of emotional distress, wrongful death, and

survival claim -- Counts V, VI, and VII, respectively -- arise from the allegedly dangerous condition described in Count I.

Plaintiffs' claims as to the State Defendants fail as a matter of law because they are based on the faulty assertion the State Defendants were somehow responsible for the claimed lack of security and safety measures at the Mount Vernon Elementary School schoolyard. However, the Newark Board of Education, like all boards of education in the State of New Jersey, is an independent corporate entity responsible for managing the operation of its schools and the maintenance of its facilities, notwithstanding that Newark was a State-operated school district, or by its current status as a district under partial State intervention. As a result, the State Defendants are not liable for the condition of property owned by Newark, and therefore, are entitled to judgment as a matter of law. Moreover, even if, *arguendo*, the State Defendants had any responsibility for the conditions present that summer night at the Mount Vernon Elementary School schoolyard, Plaintiffs' claims against the State Defendants are barred by the Tort Claims Act. Finally, the State Defendants cannot be held vicariously liable for negligence of the Newark School District. Furthermore, separate and apart from the State Defendants' entitlement to judgment as a matter of law as to all of Plaintiffs' claims, this Court should also hold that if this matter goes forward, the jury be instructed they must allocate a percentage of fault to the criminals who carried out these horrific crimes as no question of material fact exists as to their liability.

STATEMENT OF UNDISPUTED FACTS

Background

Late on the night of Saturday, August 4, 2007, Iofemi S. Hightower ("Iofemi"), Dashon Harvey ("Dashon"), Terrance Aeriel ("Terrance"), and Natasha Aeriel ("Natasha"), gathered at the Mount Vernon Elementary School schoolyard in Newark, New Jersey. SF ¶ 1. They entered the schoolyard by car through an open gate. SF ¶ 2. After a period of time, four males entered the schoolyard and met up with two other males who were already there. SF ¶ 3. Iofemi, Dashon, Terrance and Natasha were eventually surrounded by the attackers at gunpoint. SF ¶ 4. Natasha and Iofemi were sexually assaulted. SF ¶ 5. Iofemi, Dashon, and Terrance were forced at gunpoint to a secluded area of the schoolyard, where they were made to kneel facing a wall and were shot through the back of the head. SF ¶ 6. Natasha survived the attack. SF ¶ 7. Six individuals, Gerard Gomez, Jose Lachira Carranza, Shaheed Baskerville, Rodolfo Godinez, Alexander Alfaro, and Melvin Jovel, were charged with these horrific crimes. Four of them have already been convicted in connection with the attacks, with the other two awaiting trial. SF ¶ 8. The Newark Board of Education owns the Mount Vernon Elementary School and the Schoolyard adjacent to the building. SF ¶ 9.

The Newark School District's Status as a State-Operated School District

The Department of Education ("DOE") took over the operation of Newark's public schools on July 5, 1995. SF ¶ 10. At all times relevant to this

matter, Marion Bolden was the superintendent of the Newark Public Schools. SF ¶ 11. Ms. Bolden was not an employee of the State of New Jersey, but rather an employee of the local school district. Ms. Bolden was paid by the local school district, which also paid her employment "benefits." SF ¶ 12. The Commissioner of the DOE did not have the ability to grant or take away the powers or duties of Ms. Bolden, or the Superintendent of any other takeover district. SF ¶ 13.

With regard to the physical maintenance of property, the State assumed no responsibility for the same with the takeover districts. Even after a takeover was initiated, the local district retained all authority and obligation to maintain its property. This would specifically include broken fences, windows, gates, replacement of lights and any other routine type of maintenance. SF ¶ 14.

As to security functions, the State did not undertake, nor did it have any obligation to provide security in the takeover districts. To the extent security was provided, this was completely done on the local level without any State involvement. The State played no role in determining "when" or "if" security was provided in takeover districts. SF ¶ 15.

Responsibility for Security and Maintenance of Property Owned by the Newark School District

The Security Department for the Newark public schools reported directly to Superintendent Bolden. School security is a school-based function rather than an operations function. SF ¶ 16. The Security Department for the

Newark public schools is not subject to any oversight or control from the State beyond what all districts in the state are subject to. SF ¶ 17.

No district-wide policy exists with respect to schoolyard gates being open or closed after school hours. Instead, the principal of each individual school makes the determination as to whether the gates should stay open or closed, and the principals make that determination taking into account the wishes of nearby residents. SF ¶ 20. If a school elects to lock the gates, the school's custodians are tasked with doing that. SF ¶ 21. If a security guard noticed a broken fence in a Newark school, he or she was required to notify the principal of the school, or, in some cases, the custodian. SF ¶ 22.

As to maintenance, the principal of each individual school is responsible for maintenance of the school buildings and school yards and for requesting that repairs be done when needed. SF ¶ 18. Other than capital funding, the facilities department is not controlled by the State. SF ¶ 23. State oversight does not affect day to day maintenance. SF ¶ 24. Then-Commissioner Lucille Davy was never called upon to review any policy or guideline for the proper maintenance or supervision of the Newark School District schools. SF ¶ 25.

Department of Education Involvement in School Safety Issues for All Districts

No distinction exists between any local district and those under State control as to DOE's involvement in school safety issues. Specifically, safety and security was always handled on the local level irrespective of whether a district was under State control. SF ¶ 27. While the DOE required all schools

to submit security plans and "violence and vandalism reports" (which were then submitted to the Federal Government), this was done primarily in response to the attacks of September 11th and the No Child Left Behind Law. There was no distinction between the State "takeover" districts and the remainder of the State regarding these safety plans and reports. All districts supplied the same reports in the same format. SF ¶ 26. The DOE was not involved in security issues including but not limited to security cameras, security guards or specific security issues such as "gangs", which was a general concern in many schools throughout New Jersey. These types of safety functions were handled on the local level. SF ¶ 27.

DOE Involvement with School Facilities for All Districts

The Office of School Facilities within the DOE works with all school districts to complete and to work on amendments to their long-range facilities plans. SF ¶ 28. The main goal of the Office of School Facilities is to look at enrollments and capacities of schools, specifically, whether there is enough capacity to house all of the students, and if there is enough educational space such as science labs. SF ¶ 29. The oversight process for long-range facilities plans is the same for school districts under full or partial state intervention as for any other district in the state. Districts under full or partial state intervention are not required to submit long-range facilities plans with any greater frequency that other school districts. No greater scrutiny is placed upon a district under full or partial state intervention in terms of their long-

range facilities plans. Plans submitted by districts under full or partial state intervention are evaluated in the same manner as those of school districts not under any state intervention. A district which is under either full state intervention or partial state intervention which includes operations as one of the reasons under which it is under state intervention would be evaluated in the same way as any other district in the state. SF ¶ 30.

The Office of School Facilities does not get involved in looking at, commenting on, or reviewing the exterior portion of a school, such as school yards, except for reviewing the amount of square footage for playgrounds for pre-K through fifth grade. SF ¶ 31. The Office of School Facilities is not responsible for examining school yards from a safety and security perspective, nor do they have any responsibility for operating school yards in terms of when the school yards are open or closed. SF ¶ 32. If a school district wishes to alert the Office of School Facilities to an issue, the district invites the Office of School Facilities to inspect the school site. The Office of School Facilities is not responsible for inspecting school sites, and only does so at a district's request. SF ¶ 33. If an existing security camera was broken, a school district would not come to the Office of School Facilities for repair. If a district wanted a new security camera system installed at one or more schools, or for the entire district, the district would come to the Office of School Facilities and request it. The issue then becomes whether there is enough money. SF ¶ 34.

STANDARD OF REVIEW

Rule 4:46-2(c) mandates that summary judgment be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact, and the moving party is entitled to a judgment or order in its favor as a matter of law. As set forth in this Rule, an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Id. In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court held:

> Under this new standard, determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the component evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.

For the reasons set forth in detail below, the pleadings, discovery, certifications, and supporting documents demonstrate that there is no genuine issue as to any material fact, and the State Defendants are entitled to judgment as a matter of law.

LEGAL ARGUMENT

POINT I

THE STATE DEFENDANTS WERE NOT RESPONSIBLE FOR THE SECURITY OF THE PROPERTY WHERE THE ATTACKS TOOK PLACE.

Plaintiffs' claims as to the State Defendants fail as a matter of law because those claims are based on the erroneous allegation that the State Defendants were somehow responsible to provide security and safety measures at the Mount Vernon Elementary School schoolyard. However, the reality is local boards of education are independent corporate entities which are responsible for managing the operation of their schools and the maintenance of their facilities. This is not altered by the fact that Newark was a State-operated school district, or by its current status as a district under partial State intervention. The Newark School District is solely responsible for maintaining its property in a safe condition. The State Defendants bear no liability as to the condition of property owned by Newark, and therefore, are entitled to judgment as a matter of law.

A. The Relationship between the State Defendants and the Newark School District

By way of background, the State Commissioner of Education ("Commissioner") is responsible for developing and administering a statewide system for evaluating the performance of school systems throughout the State. In re Comprehensive Investigation of Sch. Dist. of Newark, 276 N.J.Super. 354, 356 (App.Div.1994)(citing former N.J.S.A. 18A:7A-2a); N.J.S.A. 18A:7A-14a.)

Under the statutory scheme in place at the time of Newark Public School's state takeover, school districts that did not satisfy basic evaluative criteria were subject to heightened scrutiny known as Level II monitoring. Id. at 356-57 (citing former N.J.S.A. 18A:7A-14a(1)).[1]

If a school district was unable to correct the deficiencies noted in the evaluative process, it was subject to increased scrutiny known as Level III monitoring. Id., at 357. In that phase, the Commissioner was authorized to direct the performance of a Comprehensive Compliance Investigation ("CCI")

[1] The former statutory scheme regarding the evaluation of school districts and designation of those districts subject to State takeover or State intervention, N.J.S.A. 18A:7A-34 to -52, have been substantially amended by L. 2005, c. 235, effective September 26, 2005. Under the current statutory scheme, school districts are evaluated for thoroughness and efficiency pursuant to the New Jersey Quality Single Accountability Continuum ("NJQSAC"). N.J.S.A. 18A:7A-10. Districts are evaluated on five key components of school district effectiveness: instruction and program; personnel; fiscal management; operations; and governance. Id. Districts that fail to satisfy 80% of each of the quality performance indicators must submit improvement plans, receive technical assistance from the Department, and may be subject to an in-depth evaluation to determine the causes of noncompliance with the quality performance indicators. N.J.S.A. 18A:7A-14(b). If a district satisfies less than 50 percent of the quality performance indicators, the Commissioner must authorize an in-depth evaluation of the district. N.J.S.A. 18A:7A-14(c) and (e). In addition, under the new implementing regulations, the Commissioner was to evaluate each of the State-operated public school districts to determine whether they met the factors for initiating return of one or more components of school district effectiveness to local control. N.J.A.C. 6A:30-8.3(i)(4). If the State-operated public school district did not meet the factors for initiating return of any components of school district effectiveness to local control, the regulations require the Commissioner to recommend to the State Board that the public school district operate under full State intervention. N.J.A.C. 6A:30-8.3(i)(5).

By evaluation dated July 23, 2007, the Commissioner determined that Newark met 86% of the NJQSAC indicators in operations management; 32% of the indicators in personnel; 39% of the indicators in instruction and program; 45% of the indicators in governance; and 66% of the indicators in fiscal management. Because Newark met more than 80% of the indicators in one of the five components of school district effectiveness, the Commissioner recommended to the State Board that the process for initiating transition to local control of that component be initiated and that Newark submit an improvement plan to address the remaining four components of school district effectiveness. Subsequent to issuance of that evaluation, by resolution dated October 17, 2007, the State Board resolved that the process for transition to local control of the functions of Operations Management shall be initiated in Newark, and that the remaining functions of Personnel, Instruction and Program, Governance, and Fiscal Management be placed under partial State intervention.

followed by the issuance of a public report documenting the district's irregularities. Id. (citing former N.J.S.A. 18A:7A-14b(2), c, e). If, after the plenary hearing before the Office of Administrative Law ("OAL"), the Commissioner determined that the district was unable to take the corrective actions necessary to establish a thorough and efficient system of education, the Commissioner was authorized to recommend to the State Board of Education ("State Board") that it issue an administrative order creating a State-operated school district. Id. (citing former N.J.S.A. 18A:7A-15).

With regard to the Newark School District, the Essex County Superintendent of Schools conducted the Level I review between March and August 1984, which resulted in unacceptable ratings in seven of ten elements and thirteen of fifty-one indicators. Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 111 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). As a result, Newark moved into Level II. Id. The Essex County Superintendent of Schools conducted Level II monitoring between August 1986 and February 1987, which resulted in unacceptable ratings in seven of ten elements and sixteen of fifty-one indicators. Id.

In December 1987, Level III monitoring was directed for Newark and, in April 1993, an external review report, prepared by independent professionals and community members, was issued. In re Comprehensive Investigation of Sch. Dist. of Newark, supra, 276 N.J. Super. at 357. Thereafter, the Commissioner directed the performance of a CCI, and retained the

management consulting firm of Towers Perrin to perform an audit of the District's governance and management functions. Id. The CCI, which revealed numerous deficiencies and irregularities, resulted in the petition for removal of the Board of Education being filed by an Assistant Commissioner. Contini, supra, 286 N.J. Super. at 111-13.

The petition was transmitted to the OAL, where an ALJ concluded that the removal of the Board of Education was justified by the low level of school attendance in Newark, the high level of students who "drop out" after eighth grade, the inordinately high level of non-instructional employees, the "deplorable condition of some of the physical facilities," the unavailability of textbooks, workbooks, and other vital instructional materials in many schools, and the "abysmal record of performance by Newark's students as measured on standardized tests." Id., at 112-13.

The Commissioner ultimately adopted the findings and conclusions of the ALJ. Id., at 113. Concluding that the undisputed facts demonstrated a "decade of failure" by Newark "to meet the State's minimum standards for certification as providing a thorough and efficient system of education," the Commissioner recommended that the State Board create a State-operated school district to administer Newark. Id., at 113. The State Board, in turn, accepted the Commissioner's recommendation and, on July 5, 1995, entered an administrative order removing the Board of Education and creating the State-Operated School District of Newark. Id., at 113-14. SF ¶ 10. Thus, the

local board of education was replaced by a district superintendent with all authority and powers previously vested in the district board of education. See former N.J.S.A. 18A:7A-15.1. The Appellate Division subsequently affirmed the State Board's determination. Contini, supra, 286 N.J. Super. at 121-29.

As noted above, the State's "take-over" of the Newark School District, meant that the local board of education was replaced by a district superintendent with all authority and powers previously vested in the district board of education. At all times relevant to this matter, Marion Bolden was the superintendent of the Newark Public Schools. SF ¶ 11. Ms. Bolden was not an employee of the State of New Jersey, but rather an employee of the local school district. She was paid by the local school district, which also paid all of her employment "benefits." SF ¶ 12. The Commissioner of the DOE did not have the ability to grant or take away the powers or duties of the Superintendent in Newark, or any other takeover district. SF ¶ 13.

B. The State of New Jersey Was Not Responsible for Security or Maintenance at the Mount Vernon Elementary School Schoolyard.

Plaintiffs allege the State Defendants were responsible for the condition of the Mount Vernon Elementary School schoolyard, and for the failure to provide adequate security. Plaintiffs' assertions fail, and their claims as to the State Defendants fail as a matter of law, because the reality is local boards of education are independent corporate entities responsible for managing the operation of their schools and the maintenance of their facilities. This rule is not altered by the fact that Newark was a State-operated school district, or by

its current status as a district under partial State intervention. Because there can be no dispute that the Newark Board of Education, rather than the State, owned the Mount Vernon Elementary School and the Schoolyard adjacent to the School building, SF ¶ 9, there can be no dispute that the State Defendants are not liable for the conditions there.

The State "take-over" of the Newark School District meant the local board of education was replaced by a district superintendent with all authority and powers previously vested in the district board of education. Marion Bolden was the superintendent of the Newark Public Schools. SF ¶ 11. Ms. Bolden was not an employee of the State of New Jersey, but rather an employee of the local school district (Newark). She was paid by the local school district, which also paid her employment "benefits." SF ¶ 12. The Commissioner of the DOE did not have the ability to grant or take away the powers or duties of Ms. Bolden. SF ¶ 13. Once a takeover district signed a contract with a superintendent, the superintendent functioned as a school district employee charged with undertaking the powers of the Board of Education, and was not under control of the State.

Boards of education are granted broad powers in the governance of the schools within their district. See N.J.S.A. 18A:10-1 and N.J.S.A. 18A:11-1. Specifically, pursuant to N.J.S.A. 18A:11-1 boards of education are required to:

a. Adopt an official seal;

b. Enforce the rules of the state board;

> c. Make, amend, and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11A, Civil Service, of the Revised Statutes; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

In addition to making and enforcing rules "for the government and management of the public schools and public school property of the district" and "necessary for the ... maintenance of the public schools of the district," the individual school districts are responsible for establishing policies and procedures for school safety and security. See N.J.A.C. 6A:16-1.1 et seq. Further, individual school districts are responsible for maintaining school facilities owned by that district. N.J.A.C. 6A:26-1.1 and -1.2. Consistent with N.J.S.A. 18A:11-1 and N.J.A.C. 6A:16-1.1 et seq., the facts of this matter clearly demonstrate the Newark School District, and not the State, was responsible for security and maintenance of property owned by the District. The State Defendants were not involved with these functions, and therefore, the State Defendants had no responsibility for security and safety at the Mount Vernon Elementary School schoolyard.

As to security, the State did not undertake, nor did it have any obligation to provide security in the takeover districts such as Newark. Security

functions were handled on the local level without any State involvement, and the State played no role in determining "when" or "if" security was provided in takeover districts. SF ¶ 15. Specifically, the Security Department for the Newark public schools reported directly to Superintendent Bolden. SF ¶ 16. The Security Department for the Newark public schools was not subject to any oversight or control from the State beyond what all districts in the state are subject to. SF ¶ 17. Instead, safety and security was always handled on the local level irrespective of whether a district was under State control. SF ¶ 27.

The State assumed no responsibility for the physical maintenance of property owned by takeover districts such as Newark. Instead, even after a takeover was initiated, the local district retained all authority and obligation to maintain its property, including broken fences, windows, gates, replacement of lights and any other routine type of maintenance. SF ¶ 14. The principal of each individual school is responsible for maintenance of the school buildings and school yards and for requesting that repairs be done when needed. SF ¶ 18. If a security guard noticed a broken fence, he or she is required to notify the principal of the school, or, in some cases, the custodian. SF ¶ 22. When security cameras are installed at a school, the principals at that school must notify someone if the cameras are not working. SF ¶ 19. Other than capital funding, the facilities department is not controlled by the State, SF ¶ 23, and State oversight does not affect day to day maintenance. SF ¶ 24.

Moreover, no district-wide policy existed in Newark with respect to schoolyard gates being open or closed after school hours. Instead, the principal of each individual school makes the determination as to whether the gates should stay open or closed, and the principals make that determination taking into account the wishes of nearby residents. SF ¶ 20. If a school elects to lock the gates, the school's custodians are tasked with doing that. SF ¶ 21.

Moreover, a local school board may "[s]ue or be sued by its corporate name." N.J.S.A. 18A:11-2(a); see also, Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98, 109 (App. Div. 1999)(noting that a board of education "is a separate political entity which may sue and be sued in its own name, may hold title to real property in its name, and is responsible for maintaining that property in a reasonably safe condition"). Consequently, boards of education are independent corporate entities which are responsible for managing the operation of their schools and the maintenance of their facilities. The fact that Newark is under partial State intervention does not change the fact that Newark is an independent corporate entity capable of being sued. As discussed above, the State-takeover of Newark Public Schools, which was established by administrative order of the State Board to ensure the provision of a thorough and efficient educational system of public education by Newark's public schools, merely removed the local board of education and replaced it with a Superintendent of the State-operated district. See former N.J.S.A. 18A:7A-15, -34, -35.

The fact that a State-operated district, like other school districts, may appeal decisions of the Commissioner of Education further supports the conclusion that Newark is a separate and distinct entity from the State Defendants. See, e.g., Morris v. State-Operated Sch. Dist. of the City of Newark, 2009 WL 2031008 (App. Div.), cert. denied 201 N.J. 146 (2009); Gonzalez v. State Operated Sch. Dist. of City of Newark, 345 N.J.Super. 175 (App. Div. 2001), certif. denied 171 N.J. 339 (2002)(State-Operated District of City of Newark appealing a decision of the New Jersey State Board of Education).

The fact that Newark does not share the privileges and immunities available to the State is further support that it is a separate and distinct entity from the State. See Febres v. Camden Bd. of Ed., 445 F.3d 227, (3d Cir. 2006)(holding the Camden Board of Education was not entitled to Eleventh Amendment immunity even though Camden is "almost entirely State funded" and that it has school district oversight allowing for gubernatorial veto of any board of education action and the Governor has the power to appoint three members to the board of education as a result of Camden's designation as a Municipal Rehabilitation and Economic Recovery Act municipality). Like all other public school districts in New Jersey, Newark is a separate and distinct entity, which holds title to property in its own name, and is responsible for maintaining said property in a reasonably safe condition.

Because the Newark School District, rather than the State, was at all times responsible for the conditions of its property, Plaintiffs' claims as to the

State Defendants must fail, and the State Defendants are entitled to summary judgment.

POINT II

PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS ARE BARRED BY N.J.S.A. 59:5-4, THE TORT CLAIMS ACT'S POLICE PROTECTION IMMUNITY

Even if, *arguendo*, the State Defendants had any responsibility whatsoever for the condition of the Mount Vernon Elementary School schoolyard, the Plaintiffs' claims against the State Defendants are barred by the Tort Claims Act, and therefore, Plaintiffs' claims against the State Defendants fail as a matter of law. Specifically, despite Plaintiffs' characterization of their claims as being based on a dangerous condition of property, Plaintiffs' claims are in fact based on the contention that the Public Entity Defendants did not provide adequate security and safety measures at the Mount Vernon Elementary School schoolyard. It is well-established that claims for failure to provide security or safety measures are essentially claims for failure to provide sufficient police protection, which claims are barred by the Tort Claims Act.

Specifically, Plaintiffs' claims against the State Defendants are barred by N.J.S.A. 59:5-4, which provides:

> Neither a public entity or a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

The immunity set forth in this statute must be interpreted "broad[ly]" to insulate the public entity's decision "whether to provide police protection

service and, if provided, to what extent." Rodriguez v. New Jersey Sports & Exposition Authority, 193 N.J.Super. 39, 43 (App.Div.1983); see also Vanchieri v. New Jersey Sports & Exposition Authority, 201 N.J.Super. 34, 40 (App.Div.1985), rev'd on other grounds, 104 N.J. 80 (1986); Setrin v. Glassboro State College, 136 N.J.Super. 329 (App.Div. 1975).

In Rodriguez, supra, the plaintiff, a racetrack patron, was assaulted and robbed of his winnings in a parking lot owned and operated by the Authority. The plaintiff contended that the assault and robbery occurred as a result of inadequate and ineffective security, specifically because the New Jersey Sports and Exhibition Authority failed to "(1) provide proper security and lighting, (2) warn of known dangers and (3) take reasonable precautions to ensure that no harm would come to those lawfully on the premises." Id. At 41. The Appellate Division held that N.J.S.A. 59:5-4 applied to all claims for failure to provide security, as such claims are essentially claims for failure to provide sufficient police protection. Id. at 43. Despite the plaintiff's characterization of the claims as being based on a dangerous condition of property, the court determined that the gravemen of plaintiff's claims was that the Authority did not provide adequate and effective security for him and other patrons at the Meadowlands Racetrack. Id. As such, the claim fell squarely within the broad immunity granted to the Authority and its employees by N.J.S.A. 59:5-4. The court further found that although the Authority may not have provided sufficient security personnel or deployed them in such a way as to prevent the

assault and robbery of the plaintiff, such conduct could not serve as a basis for imposition of tort liability against the Authority. Id.

Quoting the court's decision in Suarez v. Dosky, 171 N.J. Super. 1, 9 (App.Div.1979), cert. den. 82 N.J. 300 (1980), the Rodriguez court recognized that the legislative purpose of N.J.S.A. 59:5-4 is to protect the public entity's "essential right and power to allocate its resources in accordance with its conception of how the public interest will best be served, an exercise of political power which should be insulated from interference by judge or jury in a tort action." Id. at 43. It allows the public entity to determine, with immunity, whether to provide police protection and, if provided, to what extent. Id. The facts of the matter before this Court are indistinguishable from the facts in Rodriguez, except that in Rodriguez the victim was on the premises with permission as a business invitee. The Plaintiffs in the matter before this Court allege a lack of adequate security and safety measures, and like in Rodriguez, the allegations in Plaintiffs' Complaint are nothing more than a police protection contention couched in a "dangerous condition of public property" claim, which has been rejected as a basis for liability under identical facts.

This "dangerous condition" theory was specifically rejected in Setrin v. Glassboro State College, 136 N.J.Super. 329 (App. Div. 1975), another case analogous to the matter before this Court. In Setrin, a college student was stabbed without provocation on the grounds of a public college while en route to his dormitory after attending a basketball game. Id. at 330-331. The

plaintiff's allegations of negligence on the part of the college stemmed from the failure to exercise proper supervisory care while having knowledge of previous episodes of racial disturbance, which occurred prior to the game and during a game, and further, that the college was negligent because it failed to have sufficient police officers or guards in attendance at a game to prevent race-based assaults between students. Id. at 331. The trial court granted summary judgment in favor of the college, and the Appellate Division affirmed, holding that "consideration of the overall statutory design leads us to the conclusion that the dangerous condition of the property intended to provide a basis for the imposition of liability would not include the mere presence on the property of a person with criminal intent or purpose as in the facts of this case." Id. at 333. Thus, the Appellate Division held that "plaintiffs' contentions amount to no more than a claim that [the plaintiff] did not receive sufficient police protection service," and the Tort Claims Act expressly bars such claims. Id.

In the matter before this Court, Plaintiff's claims all stem from the allegation the Public Entity Defendants failed to protect the victims from the criminal conduct of the assailants. No matter how Plaintiffs characterize the allegations, they can only be construed as to assert a claim that the Public Entity Defendants failed to provide adequate security protection. Just as in Rodriguez and Setrin, supra, the State Defendants are absolutely immune from suit pursuant to N.J.S.A. 59:5-4, and therefore, Plaintiffs' claims against the State Defendants must fail as a matter of law.

Wright v. State, 169 N.J. 422 (2001) is easily distinguishable from the matter before this Court, and the State Defendants are not vicariously liable for the actions or inactions of the Newark School District.

Wright involved a civil action for false arrest, invasion of privacy, malicious prosecution, and false imprisonment against various employees of the Somerset County Prosecutor's Office ("SCPO"). The Court was asked to consider whether the State was vicariously liable for the actions of the SCPO. Id. The Court concluded the State is vicariously liable for the actions of county prosecutors and their subordinates when they are performing their law enforcement function (as opposed to administrative functions). Id at 452. In reaching this conclusion, the Court noted that county prosecutors and their subordinates have a unique inter-relationship with both the State and the county. Id at 450. The Court determined that because of that relationship, the "degree of control criterion" that would normally be used to determine whether an agency relationship exists was not adequate to fairly resolve the issue. Id. Rather, the Court focused on the fact that prosecutors "are discharging a State responsibility that the Legislature has delegated" to them when they "perform their law enforcement function." Id at 451. The Court concluded that the State was vicariously liable for the tortious actions of county prosecutorial employees in the performance of their law enforcement duties "because law enforcement is a basic State function, and because county prosecutors are

uniquely subject at all times to the Attorney General's statutory power to supervise and supersede them." Id.

The holding in Wright is inapplicable to the matter before this Court, as Wright is specific to county prosecutors and does not go so far as to hold the State vicariously liable for the alleged negligent acts of local school district personnel. In fact, Wright specifically distinguished law enforcement from public education, noting that "unlike public education, which as our dissenting colleague observes, also is a State function, the county prosecutor's law enforcement function is unsupervised by county government or any other agency of local government, but remains at all times subject to the supervision and supersession power of the Attorney General." Id at 452. Unlike the "supervision and supersession power" that the Attorney General has over the actions of county prosecutors, there is no similar provision allowing the State to supercede decisions of local boards of education or the district superintendent. Therefore, the State Defendants cannot be held liable for the actions or inactions of the Newark School District, and Plaintiffs' claims against the State Defendants fail as a matter of law.

POINT III

IF SUMMARY JUDGMENT IS NOT GRANTED, THE JURY MUST BE INSTRUCTED TO ALLOCATE A PERCENTAGE OF FAULT TO THE INTENTIONAL TORTFEASORS

Irrespective of the weaknesses of Plaintiffs' claims against the State Defendants, if this matter proceeds to trial, the jury must allocate a percentage of fault to the criminals who carried out the attack, and who will spend the rest of their lives in jail. No dispute exists that four of the six named intentional tortfeasors have already been convicted of the criminal charges arising out of the attack[2]. Charges are pending against the remaining two and we expect those cases to be resolved shortly. SF ¶ 8. The four criminal convictions collaterally estop any defense co-defendants might make as to liability. I/M/O Guardianship of J.O., 327 N.J. Super. 304, 309 (App. Div. 2000), citing In re Musto, 152 N.J. 165, 172 (1997); In re Coruzzi, 95 N.J. 557, 567 (1984). Should the remaining two individuals[3] be convicted in connection with the attacks, the same will hold true for them. Because no question of material fact exists as to the intentional tortfeasors' liability, this Court should find liability on the part of the intentional tortfeasors as a matter of law. The only jury issue would be the allocation of the actual percentages.

[2] Jovel, Alfaro, Godinez, and Carranza have already been convicted.
[3] Baskerville and Gomez.

CONCLUSION

For all of the above reasons, the State Defendants are entitled to summary judgment and the claims should be dismissed with prejudice.

MORGAN, MELHUISH, ABRUTYN
Attorneys for Defendants, State of New Jersey and State of New Jersey, Department of Education

By: _____
LEONARD LEICHT, ESQ.

Dated: May 18, 2012

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Defendants State-Operated School District of the City of Newark (improperly pled as "State-Operated School District for the City of Newark" and "Newark Board of Education") and Marion A. Bolden

NATASHA AERIEL, et al., Plaintiffs, v. STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO.: ESX-L-4320-08 CIVIL ACTION

DEFENDANTS STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK AND MARION A. BOLDEN'S BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Vito A. Gagliardi, Jr., Esq.
Of Counsel and on the Brief

Eliyahu S. Scheiman, Esq.
On the Brief

PRELIMINARY STATEMENT

Defendants State-Operated School District for the City of Newark ("District") and former State District Superintendent, Marion A. Bolden, seek summary judgment dismissing the Complaint of Plaintiffs Natasha Aeriel and estates of Terence Aeriel, Iofemi Hightower and Dashon Harvey (collectively "Plaintiffs") under *R.* 4:46. This motion turns on the narrow threshold and legal definitional issue as to what constitutes a "dangerous condition" of public property under the New Jersey Tort Claims Act. Accordingly, and as explained below, summary judgment is proper.

Sometime between 10:30 p.m. and midnight on Saturday, August 4, 2007, Plaintiffs -- four adults from Newark -- choose to drive into the vast school grounds of the Mount Vernon Elementary School in the Ivy Hill Section of Newark. That day, as any other, the elementary school property was perfectly safe for use as a school and school-related functions. Plaintiffs were not there, however, for school or after-school activities. They were there at that hour of night because they were looking for a place to "chill," "hang out," sit on a stoop and smoke "black and mild" cigars. Plaintiffs had already been warned by Newark Police earlier in the evening to vacate a public park because of curfew. They went to the Mount Vernon Elementary School anyway. Around midnight, Plaintiffs were attacked by six criminals and members of the "MS-13 gang" in a malevolent gang incident. They now claim that an allegedly open vehicular gate to the elementary school grounds combined with the risk of foreseeable criminal activity at that remote time of night rendered the school property in a "dangerous condition" under the Tort Claims Act. Plaintiffs claim that because something bad happened, the elementary school property must have been in a "dangerous condition."

Before ever considering whether an allegedly unlocked gate enhanced the risk of foreseeable criminal activity on the night of the attacks, the Tort Claims Act and relevant Supreme Court decisions dictate that a trial court must first engage in a threshold determination as to whether the alleged combination of gate and criminal acts "created a substantial risk of injury when such property [was] used with due care in a manner in which it [was] reasonably foreseeable that it [would] be used." This preliminary "due care" inquiry -- which has no bearing on questions of comparative fault -- is twofold. First, a trial court must ask whether the property poses a danger to the general public when used in the normal, foreseeable manner -- in other words, to the demographic that normally uses the space. Second, a court must measure the categorical nature of a plaintiff's activity against the normal, foreseeable use, to see if their use was "so objectively unreasonable" -- in relation to that reasonably foreseeable -- so that the condition of the property itself cannot reasonably be said to have caused the injury.

Here, based on the undisputed material facts, the preliminary "due care" determination presents a legal rather than factual issue. It is irrelevant whether a gate to the Mount Vernon Elementary School grounds was open on August 4, 2007. It is immaterial whether security cameras or lights were broken. Public entities are entitled to presume their property will be used with "due care" as reasonably foreseeable. By design, the Tort Claims Act expressly excludes public entities from liability for people doing unreasonable things on public property. The elementary school grounds were not defective in relation to their normal, foreseeable functions -- school and after-school activities. The property was not "dangerous" or "defective" merely because pedestrians could walk or drive in unobstructed and did so unreasonably.

In short, since proof of a plaintiff's "due care," like evidence of a physical condition of property, is an absolute prerequisite to public entity "dangerous condition" liability, and since

Plaintiffs cannot establish that sitting on a stoop "chillin" and smoking cigars on elementary school grounds at midnight on a Saturday in August was an objectively reasonable, foreseeable use of the elementary school property, the Complaint should be dismissed. Further, because New Jersey law bars a plaintiff from simultaneously asserting "dangerous condition" and ordinary negligence-based claims against a public entity for injuries arising from the same factual predicate, Plaintiffs' negligent infliction of emotional distress claim against the District should be dismissed. Similarly, because a "dangerous condition" of property claim cannot be raised against an individual employee, Plaintiffs cannot concurrently advance "dangerous condition" and ordinary negligence claims, and because, regardless, there is no basis for individual liability against Ms. Bolden, Plaintiffs' claims against Ms. Bolden should be dismissed with prejudice.

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I. The Criminal MS-13 Gang Attacks of August 4, 2007

This civil case arises from the MS-13 gang attacks/homicides committed on the grounds of the District's Mount Vernon Elementary School ("Schoolyard") around midnight on Saturday, August 4, 2007. (*See generally* Plaintiffs' Complaint, attached to Certification of Eliyahu S. Scheiman Esq. ("Scheiman Cert."), at **Exhibit A**.) Plaintiffs were sitting on a stoop in the Schoolyard that night "hanging out," "chillin" and smoking "black and mild cigars." (*See* Deposition of Natasha Aeriel, dated February 24, 2012 ("Aeriel Dep."), Scheiman Cert., **Exhibit B**, at 110:21-111:14, 119:23-120:7, 138:14-139:7; Alexander Alfaro Trial Transcript, dated March 2, 2011 ("Alfaro Transcript"), testimony of Natasha Aeriel, **Exhibit C**, at 113:6-115-11; Rodolfo Godinez Trial Transcript, dated April 29, 2010 ("Godinez Transcript"), testimony of Natasha Aeriel, **Exhibit D**, at 60:6-22.) Plaintiffs were not students at the Mount Vernon Elementary School on the night of the attacks. (*See* Plaintiffs' Answers to Interrogatories, No. 24, Scheiman Cert., at **Exhibit E**.)

A. Plaintiffs are Told to Vacate Vailsburg Park by Uniformed Police Enforcing Curfew.

At approximately 9:45-10:00 p.m. on August 4, 2007, Plaintiffs drove to the Vailsburg Park in Newark. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 113:3-7; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 101:21; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 40:15-41:2.) Around 10:00 p.m., Plaintiffs were instructed to leave Vailsburg Park by a uniformed Newark police officer enforcing curfew. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 113:12-114:17, 140:4-12; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 101:11-25, 216:15-23; Godinez Transcript, testimony of Natasha Aeriel,

Exhibit D, at 40:22-42-2.) Plaintiffs did not go home. Instead, they decided to find another place to "chill" and ultimately choose to go to the Schoolyard to eat food and smoke cigars. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 138:14-139:7; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 102:14-10; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 42:6-16.)

B. Plaintiffs Disregard Curfew and Go to the Schoolyard

Plaintiffs planned to be at the Schoolyard only briefly. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 110:21-111:14, 138:14-139:2-11.) Ms. Aeriel had plans to visit her boyfriend afterwards. (*Id.*) Plaintiffs arrived at the Schoolyard by car around 10:30 p.m. (*See* Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 49:5-17.) Ms. Aeriel was driving. (*See id.* at 49:23-50:8.) No school-related activities were in session at that time. (*See* Complaint, Scheiman Cert., **Exhibit A**, at ¶¶ 1, 46; *see also* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 122:3-24; 138:7-139:7.)

Plaintiffs chose the Schoolyard because it was not a public park where they would be seen by police officers enforcing curfew and could be alone. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 40:22-44:23, 48:10-17, 165:8-166:2; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 112:20-113:5.) There is a public park across the street from the Mount Vernon Elementary School, the Ivy Hill Park. (*See* Complaint, Scheiman Cert., **Exhibit A**, at ¶ 73, *see also* photograph taken by Plaintiffs' premises liability expert, Randall Atlas, Scheiman Cert., **Exhibit F**.) Plaintiffs' decision to go to the Schoolyard was at least in part based on the fact that Ms. Aeriel and Ms. Hightower had gone there previously at night during non-school hours and recalled that no one else was there. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at

40:22-44:23, 48:10-17, 50:20-25, 121:20-122:6; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at p. 43:10-24.)

The Schoolyard is expansive. (*See generally* Essex County Prosecutor's Office Crime Scene Unit Preliminary Report ("ECPO Preliminary Report"), dated December 11, 2007, Scheiman Cert., **Exhibit G**, at p. 1-2; *see* various photos of Schoolyard taken by Randall Atlas, ("Atlas Photos"), Scheiman Cert., **Exhibit H**.) It has an upper and lower level. (*See id.*) On August 4, 2007, the upper level contained a parking lot for vehicles of school personnel, basketball courts, and playground equipment including a jungle gym and monkey bars. (*See id.*) The upper level was surrounded on the north and west sides by a wall and fence. (*See id.*) Further north of the playground equipment and basketball courts was a free standing aluminum bleacher with three risers. (*See id.*) At the northwest corner of the upper level was a set of stairs descending to a lower level. The lower level had a courtyard, additional playground equipment, and a parking area for school administration. (*See id.*)

On arrival, Plaintiffs drove into the Schoolyard through an allegedly open gate on Tuxedo Parkway. (*See* Complaint, Scheiman Cert., **Exhibit A**, at ¶ 48.) They parked the car near the bleachers at the northwest corner of the upper level. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 119:23-120:7; 122:3-6; 123:8-11; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 55:4-22; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 111:1-16.) Two of the criminal defendants were already occupying the bleachers, drinking beer. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 119:23-120:7; 122:3-6; 123:8-11; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 55:4-22; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 111:1-16.) Plaintiffs were disappointed the criminals were there. (*See* Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 112:20-113:22.) To be alone, Plaintiffs

sat on the stairs beyond the bleachers leading to the lower level of the Schoolyard. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 119:23-120:7; 122:3-6; 123:8-11; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 55:4-22; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 111:1-16.) They were "hanging out," listening to music from the car radio, dancing and smoking "black and mild" cigars. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 110:21-111:14, 125:10-18, 126:4-11, 127:20-24, 128:13-17, 138:14-139:11; Alfaro Transcript, testimony of Natasha Aeriel, **Exhibit C**, at 113:6-116:11; Godinez Transcript, testimony of Natasha Aeriel, **Exhibit D**, at 60:6-22.) Around 11:30 p.m., the remaining four criminal defendants arrived at the Schoolyard and together the six MS-13 members attacked Plaintiffs, killing three of them and seriously injuring Ms. Aeriel. (*See* Complaint, Scheiman Cert., **Exhibit A**, at ¶ 1; Aeriel Dep., Scheiman Cert, **Exhibit B**, at 143:9-148:3.)

II. The Mount Vernon Elementary School

The Mount Vernon Elementary School is located in the "West Region" of the District. (*See* Deposition of Bertha Dyer Vol. I, dated September 7, 2010 ("Dyer Dep. I"), Scheiman Cert., **Exhibit I**, at 26:23-27:16.) The school year runs from September to end of June. (*See id.* at 93:20-25, 218:24-219:3; Deposition of Brenda Lee, dated February 24, 2011 ("Lee Dep."), Scheiman Cert., **Exhibit J**, at 31:23-32:3.) A typical school day is from 8:00 a.m. to approximately 3:00 p.m. (*See* Dyer Dep. I, Scheiman Cert., **Exhibit I**, at 118:3-8-123:19.) After-school educational programs run from approximately 3:00 p.m. to 6:00 p.m. (*See id.* at 123:13-19.) A few days a week during the school year there is an after school program in the gymnasium from 6:00 p.m. to 9:00 p.m. (*See id.*; Deposition of Charles Trent ("Trent Dep."), Scheiman Cert., **Exhibit K**, at 38:12-39:4.)

The Mount Vernon Elementary School also had school during the Summer 2007 that began after the fourth of July and went to approximately August 12th. (*See* Lee Dep., Scheiman Cert., **Exhibit J** at 29:4-23.) The educational component of summer school ran from 8:00 am to 12:00 p.m. (*See id.* at 29:4-9.) Students did not use the Schoolyard during summer school. (*See* Deposition of Elma Day, dated December 22, 2010 ("Day Dep."), Scheiman Cert., at **Exhibit L**, at 48:21-49:11.)

There is no District-wide policy regarding closure of school grounds when school is not in session or after operational hours. (*See* Deposition of Marion Bolden, dated September 8, 2010, ("Bolden Dep."), Scheiman Cert., at **Exhibit M**, at 54:15-22, 93:12-95:8; Deposition of Willie Freeman ("Freeman Dep."), Scheiman Cert., **Exhibit N**, at 111:1-112:4.) Decisions as to whether to close school playgrounds after operational hours are made on a school-by-school basis by the principal of each of the District's schools. (*See id.)* At the time of the August 4, 2007 attacks, the policy of the Mount Vernon Elementary School was that the Tuxedo Parkway Gate be locked when school and after-school programs were not in session. (*See* Deposition of Bertha Dyer, dated December 7, 2010 ("Dyer Dep. II"), Scheiman Cert., **Exhibit O**, at 88:23-89:12, 93:7-98:4.)

The Schoolyard was not open to public use during non-school or after-school hours. (*See id.*) To use school grounds after operational hours, a written permit must be obtained from the District's Facilities Department. (*See* Bolden Dep., Scheiman Cert., **Exhibit M**, at 54:5-9; Dyer Dep. II, Scheiman Cert., **Exhibit O**, at 44:5-22.) As Plaintiffs' premises liability expert concedes, smoking cigars in the Schoolyard late on a Saturday night in the summer is not an objectively reasonable use of the property. (*See* Deposition of Randall Atlas, dated March 28, 2012 ("Atlas Dep."), Scheiman Cert., **Exhibit P**, at 196:17-24.)

While roving District security personnel patrol the District's 82 schools 24 hours a day, there are no onsite security personnel stationed at the Mount Vernon Elementary School after 9:00 p.m. during the school year, and 3:00 p.m. in the summer. (*See* Dyer Dep. I, Scheiman Cert., **Exhibit I**, at 22:5-23:5, 71:18-72:15, 137:12-138:22; Freeman Dep., Scheiman Cert., **Exhibit N**, at 136:20-137:14.) No District personnel work at the Mount Vernon Elementary School over the weekend. (*See* Dyer Dep. I, Scheiman Cert., **Exhibit I**, at 138:16-18.) As of August 4, 2007, there were nine security cameras in total at the Mount Vernon Elementary School, six inside the school and three on the exterior of the building. (*See* Deposition of Manuel Quinones, dated November 7, 2010 ("Quinones Dep."), Scheiman Cert., **Exhibit Q**, at 36:25-37-9.) None of the three external cameras was facing the steps to the lower level of the Schoolyard where Plaintiffs were "chillin." (*See id*, at 39:1-24.) The external cameras are manned by security personnel stationed at the Mount Vernon School during operational hours only. (*See* Dyer Dep. I, Scheiman Cert., **Exhibit I**, at 75:12-76:14.) After operational hours, the exterior cameras are unmanned. (*See id.*; *see also* Atlas Dep., Scheiman Cert., **Exhibit P**, at 134:8-18 ("the school's priority was to keep an eye on the interior spaces, and on the students' movement, within that school during school hours.")

C. **The Complaint**

On June 3, 2008, Plaintiffs filed a 286-paragraph Complaint against the District, Ms. Bolden, the State of New Jersey ("State") and the criminal MS-13 defendants. (*See* Complaint, Scheiman Cert., **Exhibit A**.) The Complaint alleges that the District and/or Ms. Bolden negligently created a "dangerous condition" under *N.J.S.A.* 59:4-2 of the New Jersey Tort Claims Act. It also contains derivative counts for negligent infliction of emotional distress, wrongful death and survival claims. Specifically: (1) Count One asserts a "dangerous condition" of public

property claim against the District, Ms. Bolden and State, (*id.* at ¶¶ 241-54); (2) Count Two asserts an intentional infliction of emotional distress claim against the criminal defendants, (*id.* at 255-62); (3) Count Three asserts an assault and battery claim against the criminal defendants, (*id.* at ¶¶ 263-69); (4) Count Four asserts a negligence claim against fictitious defendants, (*id.* at ¶¶ 270-74); (5) Count Five asserts a negligent infliction of emotional distress claim against the District, Ms. Bolden and State, (*id.* at ¶¶ 275-82); (6) Count Six alleges wrongful death against all defendants, (*id.* at ¶¶ 283-86) and; (7) Count Seven asserts survival claims against all defendants. (*Id.* at ¶¶ 283-86.)

Prior to answering the Complaint, the District filed a motion to dismiss the Complaint under *R.* 4:6-2(e), arguing that Plaintiffs' "dangerous condition" and derivative claims were effectively inadequate security allegations from which the District is statutorily immune under the Tort Claims Act. (*See* transcript of Motion to Dismiss argued before the Hon. Dennis F. Carey, III, P.J.Cv., dated September 4, 2008, Scheiman Cert., **Exhibit R.**) Judge Carey denied the motion, finding that:

> The -- the Court is -- troubled by the case, and although I am going to deny the motion to dismiss under Rule 4-6e -- 2e, the Court recognizes that the arguments that have been set forth by the defendants may have to be looked upon differently at some point down the road after some preliminary discovery has taken place.

(*Id.* at 64:2-8.)

The District filed its Answer on October 17, 2008. (Scheiman Cert., **Exhibit S.**) Default was entered against the criminal defendants on August 8, 2008. (*See* Entry of Default, dated August 8, 2008, Scheiman Cert., **Exhibit T.**) Pursuant to the Court's current Case Management Scheduling Order filed on April 4, 2012, liability expert discovery concluded on May 3, 2012. (Scheiman Cert., **Exhibit U.**) The deadline for filing dispositive motions is May 18, 2012. (*Id.*)

The District and Ms. Bolden now move for summary judgment dismissing the Complaint under *R.* 4:46.

LEGAL ARGUMENT

The District's summary judgment motion must be analyzed in accordance with the overarching legislative policy of the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq.* ("TCA" or "Act"). The requirements of the Act are "stringent," and place a "heavy burden" on plaintiffs seeking to establish public entity liability. *Bligen v. Jersey City Hous. Auth.*, 131 N.J. 124 (1993). The Act "creates an underlying presumption of immunity . . . unless liability is specified" and expressly imposed by the Act. *Manna v. State*, 129 N.J. 341, 344 (1992); *Rodriguez v. New Jersey Sport & Exposition Auth.*, 193 N.J. Super. 39, 42 (App. Div. 1983) (citing *Coppola v. State*, 177 N.J. Super. 37, 39 (App. Div. 1981), *certif. denied*, 87 N.J. 398 (1981)). When the Act permits public entity liability, "that liability is in turn subject to specific immunities created by the Act, as well as any common law defenses." *Manna*, 129 N.J. at 347; *Bligen*, 131 N.J. 124 ("common-law immunities survive the enactment of the [TCA] unless specifically overruled"); *Weiss v. New Jersey Transit Rail Operations, Inc.*, 128 N.J. 376, 381-382 (1992) (where "one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity."); *N.J.S.A.* 59:2-1 ("any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.") In considering claims against a public entity under the TCA, the New Jersey Supreme Court has cautioned that courts are to approach these cases from the perspective that immunity is the dominant theme of the Act:

> In the absence of a comprehensive statute the New Jersey Supreme Court ha[d] developed the analytical approach that courts "ought not to be ... asking why immunity should not apply in a given situation but rather ... asking whether there is any reason why it should apply." *B.W. King, Inc. v. West New York*, 49 N.J. 318, 325 (1967). This approach is no longer necessary in light of this

> comprehensive Tort Claims Act. Rather the approach should be whether an immunity applies and if not, should liability attach. *It is hoped that in utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities.*

Weiss, 128 N.J. at 383 (citing *N.J.S.A.* 59:2-1 Task Force Comment) (emphasis added).

As demonstrated below, the District is entitled to summary judgment because the undisputed material facts show Plaintiffs cannot establish that a "dangerous condition" existed on the elementary school grounds as defined by *N.J.S.A.* 59:4-1(a), which proximately caused Plaintiffs' injuries. Specifically, Plaintiffs objectively failed to exercise "due care" and use the Mount Vernon Elementary School grounds in the normal, foreseeable manner. No court has ever come close to imposing "dangerous condition" liability on a public entity for any circumstance approximating that of a plaintiff sustaining injuries after being attacked by a vicious gang while sitting on a stoop smoking cigars behind an elementary schoolyard at midnight on a weekend in the summer. In addition, Plaintiffs are barred from pursuing ordinary negligence claims against the District and Ms. Bolden for the events of August 4, 2007, and there is no basis for the emotional distress claims against the District and/or Ms. Bolden. As such, the District and Ms. Bolden are entitled to summary judgment dismissing the Complaint.

POINT I

PLAINTIFFS CANNOT MEET THE DEFINITION OF A "DANGEROUS CONDITION" UNDER *N.J.S.A.* 59:4-1(a).

Before reaching the elements of a "dangerous condition" cause of action under section *N.J.S.A.* 59:4-2 of the TCA, a plaintiff must first satisfy the definitional threshold requirements of *N.J.S.A.* 59:4-1(a). Specifically, *N.J.S.A.* 59:4-1(a) defines a "dangerous condition" as a "condition of property that creates a *substantial risk of injury* when such property is *used with due care in a manner in which it is reasonably foreseeable that it will be used.*" (emphasis added). What this means is that, "proof of a plaintiff's due care, like proof of the physical condition of property, is a threshold requirement." *See Garrison v. Twp. of Middletown*, 154 N.J. 282, 294 (1998). The District's motion is not concerned with Plaintiffs' evidence of any physical condition of property in the Schoolyard and assumes, as true, the allegation that the Tuxedo Parkway Gate was not locked on August 4, 2007. Regardless of whether that gate was open that night, however, under the statutory language and case law interpreting section *N.J.S.A.* 59:4-1(a), Plaintiffs cannot establish there was a "substantial risk of injury" on August 4, 2007 had they used the elementary school grounds "with due care" in a manner "reasonably foreseeable that it would be used." Therefore, this claim should be dismissed as a matter of law.

A. The Preliminary Definitional Determination Under *N.J.S.A.* 59:4-1(a) Is A Legal Question For The Trial Court.

"It has long been recognized that the trial judge is required to make a 'preliminary determination [under *N.J.S.A.* 59:4-1] as to whether the alleged condition is in fact a dangerous one within the meaning of the statute. Otherwise, the legislatively-decreed restrictive approach to liability would be illusory.'" *Burroughs v. Atlantic City*, 234 N.J. Super. 208 (App. Div. 1989) (affirming summary judgment against claim that foreseeable conduct of people diving

from boardwalk in absence of effective warnings was "dangerous condition") (citing *Polyard v. Terry*, 160 N.J. Super. 497, 508 (App. Div. 1978), *aff'd o.b.* 79 N.J. 547 (1979)); *see also Vincitore v. New Jersey Sports & Exposition Auth.*, 169 N.J. 119, 124 (2001) (determination "subject to the court's assessment whether it can reasonably be made under the evidence presented."); *Garrison v. Twp. of Middletown*, 154 N.J. 282, 292 (1998) (summary judgment to public entity where plaintiff injured playing football on municipal parking lot, because injury caused by unreasonable use, not physical condition of property); *Levin v. County of Salem*, 133 N.J. 35 (1993) (affirming summary judgment on claim that bridge from which people were known to dive into shallow water was not "dangerous condition," because injuries not caused by physical defect in bridge but unreasonable activities); *Lopez v. New Jersey Transit*, 295 N.J. Super. 196 (App. Div. 1996) (affirming summary judgment to public entity because decedent killed during unauthorized use of train tracks for private recreational activity did not render tracks a "dangerous condition" despite known trespassing at location); *Speziale v. Newark Hous. Auth.*, 193 N.J. Super. 413, 416-419 (App. Div. 1984) (finding that trial judge must make threshold determination as to existence of "dangerous condition" before jury can consider claim of plaintiff who slipped navigating staircase due to rain water on floor and who failed to show substantial risk of injury when property used with due care); *Hawes v. New Jersey Dept. of Transp.*, 232 N.J. Super. 160 (Law Div. 1988), *aff'd o.b.* 232 N.J. Super. 159 (App. Div. 1988) (summary judgment to public entity where decedent struck by train while crossing track because failure to erect fence did not cause injury, but foreseeable dangerous activity of trespassing/failure to use property with due care).

Thus, resolution of the "due care" issue under *N.J.S.A.* 59:4-1(a) is appropriate for summary judgment.

B. As A Matter Of Law, Plaintiffs Failed To Use The Schoolyard With "Due Care" In The Normal, Foreseeable Manner.

Under *N.J.S.A.* 59:4-1(a), the dispositive issue is whether an unlocked gate allowing access to the Schoolyard created a "substantial risk of injury" when the elementary school grounds were used with "due care" in a normal, foreseeable manner. If the answer is no, Plaintiffs cannot establish the existence of "dangerous condition" within the meaning of *N.J.S.A.* 59:4-1(a) as a matter of law. In this context, "due care" has nothing to do with Plaintiffs' comparative fault, but the "objectively reasonable use by the public generally" or "community perspective." *Garrison*, 154 N.J. at 291; *see Vincitore*, 169 N.J. at 126-133.

The New Jersey Supreme Court has delineated a two-part test for determining whether a plaintiff's claim meets the Act's "due care" requirement under *N.J.S.A.* 59:4-1(a). *See Vincitore*, 169 N.J. at 126-133; *Garrison*, 154 N.J. at 292-295. The first consideration is "whether the property poses a danger to the general public when used in the normal, foreseeable manner." *Vincitore*, 169 N.J. at 127. The "general public" is the demographic that would normally use the property. *Id.* at 127. This "reasonable user requirement":

> presupposes some uniform standard of behavior with regard to persons utilizing public property. However, the infinite variety of situations that may arise makes it impossible to fix definite rules in advance of all conceivable conduct. In other words, it would be impossible for a public entity to prognosticate every imaginable way in which its property can or will be used. In a similar vein, it would be folly to impose a burden on a public entity to protect individuals from every conceivable risk attendant to the use of its property. The Legislature has dealt with this problem by creating a fictitious person, a reasonable person of ordinary prudence. Under the statutory definition, a dangerous condition exists if the property poses a substantial risk of injury when it is used in a reasonably prudent manner in a foreseeable way. To that extent, the reasonable user requirement does not refer to the actual activities

> of the plaintiff or others. Rather, it constitutes a personification of a community ideal of reasonable behavior.

Daniel v. New Jersey Dept. of Transportation, 239 N.J. Super. 563, 587 (App. Div. 1990). The second consideration "is whether the nature of the plaintiff's activity is 'so objectively unreasonable' that the condition of the property cannot reasonably be said to have caused the injury." *Vincitore*, 169 N.J. at 127. In this step, a court effectively compares the nature of the plaintiff's activity with the "community" standard under part one of the test. The focus is not on the subjective details of the plaintiff's activity, but on the nature of the activity itself. *See id.* If, after engaging in the analysis, a court concludes a public entity's property is dangerous only when used without due care, the property is not in a "dangerous condition" within the meaning of *N.J.S.A.* 59:4-1(a). *See Garrison*, 154 N.J. at 287.

In *Garrison*, 154 N.J. at 284, a 16-year-old plaintiff was injured around 9:30 p.m. playing football on a dimly illuminated municipal parking lot. *Id.* at 285. Though the town had not given the players permission to play football there, they used the lot because it was illuminated and the "lines demarcating the parking spaces served as boundaries." *Id.* In the past, patrolling police officers had not told the players to stop playing football. *Id.* The plaintiff was aware that the section of the parking lot he was playing on had an uneven surface or "declivity." *Id.* During the game, however, he planted his foot on the uneven surface and damaged his knee. *Id.* He then sued the town for negligently allowing a "dangerous condition" or declivity to exist in the parking lot, which allegedly caused his injury. *Id.*

The Court characterized the issue as whether the:

> declivity in the parking lot created a substantial risk of injury when the property was used with due care. So stated, our analysis focuses not on plaintiff's individual conduct, but on whether playing night football on a paved parking lot with a known declivity constitutes a use of the property with the care that was

> due ... the purpose of the evaluation is to ascertain whether the plaintiff had engaged in an activity that is so objectively unreasonable that liability for resulting injuries may not be attributed to the condition of the property.

Id. at 287, 292. It then affirmed dismissal of the plaintiff's claim on summary judgment. The Court reasoned that playing football on a "poorly lit uneven railroad-station parking lot constitutes a use of public property that is as a matter of law 'without due care,'" as nothing in the record showed that the "declivity posed a risk to commuters or to other persons who parked their cars or walked to the train station," in brief, "to anyone who used [the property] with due care." *Id.* at 293, 287.

In this case, Plaintiffs' argument is that, because they were attacked, the condition of the elementary school property must have presented a risk of harm to anyone using it. Applying the *Garrison* analytical framework, however, and even with all favorable inferences, no viable argument can be made from the mere occurrence of the MS-13 attacks that the Mount Vernon Elementary School grounds were dangerous to anyone using the property for school and after-school programs. *See Garrison*, 154 N.J. at 293 ("fact that plaintiff[s] [were] injured does not prove that the condition of the property posed a risk of harm to anyone who exercised due care in the use of the property"); *Levin*, 133 N.J. at 49 (rejecting notion "that we look to effects to determine whether a dangerous condition of property exists," that "whenever danger exists, so does a dangerous condition of property.") Under the "community perspective" inquiry, there is no basis to suggest that the Schoolyard itself, even with the gate open, posed any danger to objectively reasonable members of the general public who normally used the elementary school grounds. *See Vincitore*, 169 N.J. at 127. Regardless of the fact that the policy of the Mount Vernon Elementary School was that the gates be locked during non-operational hours, access to the Schoolyard was for objectively reasonable use of the property for school-related and after-

school activities, not for sitting on the stairs at the back of the school building to "chill" and smoke cigars at midnight on a Saturday night in August.

The second factor, the objective "nature" of Plaintiffs' activity, further underscores that the elementary school grounds posed no danger to anyone using it in the "normal, foreseeable manner," and that Plaintiffs' conduct was "so objectively unreasonable" that an open gate or other alleged condition of property "cannot reasonably be said to have caused the injury." *See id.* at 126-127. Using an unsupervised and remote stoop at the back of a school building in an expansive schoolyard in Newark around midnight on a Saturday night in the dead of summer to "hang out," "chill" and "smoke cigars" does not qualify as a use of the elementary school grounds with the care that was due, after just having been told by Newark Police to vacate Vailsburg Park because of curfew. *See Garrison*, 154 N.J. at 287. No after-school programs were taking place in the Schoolyard at that hour. Plaintiffs explicitly went there for the isolation. They were looking for a secluded spot. They thought no one else would be there. They understood the Schoolyard was not a public park. (*See* Aeriel Dep., Scheiman Cert., **Exhibit B**, at 40:22-44:23, 48:10-17, 165:8-166:2.) No different than playing football on a municipal parking lot, it is "manifest" that the nature of Plaintiffs' activity "constitutes a use of public property that is as a matter of law 'without due care.'" *See id.* at 293; *see, e.g., Levin*, 133 N.J. at 44 (diving into shallow water from bridge did not render bridge a "dangerous condition"); *Lopez*, 295 N.J. Super. 196 (unauthorized use of train tracks for private recreational activity did not render tracks a "dangerous condition"); *see also Rodriguez*, 193 N.J. Super. 39 (criminal acts in parking lot of sports complex not a "dangerous condition"); *Setrin v. Glassboro State College*, 136 N.J. Super. 329 (App. Div. 1975) (assault on campus of state college or criminal propensity of third-parties not a "dangerous condition.") Indeed, Plaintiffs' own premises liability expert

concedes that smoking cigars in the Schoolyard late at night is not an objectively reasonable use of the property. (*See* Atlas Dep., Scheiman Cert., **Exhibit P**, at 196:17-24.)

The Supreme Court's use of the *Hawes* decision in *Garrison* underscores the significance of a plaintiff's unreasonable conduct in a case involving use of public property. In *Hawes*, the decedent was killed by a train owned by New Jersey Transit ("NJT") while crossing a track. The plaintiff alleged the track was in a "dangerous condition" because NJT failed to erect fences to prevent pedestrians from crossing the tracks, "despite knowledge that the area in question was one regularly used by trespassers." *Hawes*, 232 N.J. Super. at 161. The court dismissed the claim on summary judgment, finding that, "[c]ommon sense dictates that a person using due care would make certain no trains were approaching before walking across a railroad track." *Id.* at 164. It explained:

> the plaintiff contends that the property in question was dangerous because the State knew that people were crossing the tracks in the area and should have, therefore, done something to prevent them from doing so. If a governmental entity, however, is not liable for the foreseeable activities of a third person which results in injuries to a claimant, how then is it responsible for activities which it could foresee of the injured person himself? *Put another way: if the decedent in this case had died as a result of being struck by another person while on the railroad tracks, case law would prohibit the imposition of liability upon the State, even though the State was aware that persons were trespassing upon the property and that assaults had occurred on prior occasions.* Logic would dictate then that the State is also not liable to a foreseeable trespasser who is struck not by another trespasser, but by a train.

Id. at 163 (emphasis added). "Common sense" likewise dictates that using the inner recesses of an elementary school property at midnight on a Saturday evening in summer to "hang out" and smoke cigars is not an objectively reasonable use of the property with "due care." Indeed, this case is precisely the *Hawes* hypothetical of a plaintiff "being struck by another person ... [when

the public entity is allegedly] aware that persons were trespassing upon the property and that assaults had occurred on prior occasions." (*See id.*)

In *Bartell v. Palos Verdes Peninsula Sch. Dist.*, 147 Cal. Rptr. 898 (Cal. Ct. App. 1978), also relied on by the Court in *Levin*, 133 N.J. at 47-48, a 12-year-old child gained access to an elementary school playground either through an unlocked gate or hole in the fence. *Id.* at 899. He suffered fatal injuries after a fall skateboarding. *Id.* As here, the plaintiffs claimed that the defective condition of the fence (holes) or unlocked gate, in conjunction with allegations of the known use of the schoolyard for the dangerous skateboard game, combined to create a "dangerous condition." The trial court dismissed the plaintiffs' claim on summary judgment. The appellate court affirmed, holding that the plaintiffs failed to state a claim for a "dangerous property condition" as a matter of law. *Id.* at 900. In particular, it found that:

> Regardless of whether the fence was in disrepair or the gate unlocked, we do not have a situation where the defect, in and of itself, was inherently dangerous ... Even though we assume the school district knew of the dangerous activity (a skateboard version of crack-the-whip), knew the playground was the only unobstructed area where the game could be played locally, and knew the playground was customarily used for such games, the alleged defects merely allowed access to the area, and as such they go to the question of the school district's duty of supervision and control, if any, over its property, and not to the existence of a dangerous condition. *The injuries were the direct result of the dangerous conduct of plaintiffs' son and his companion and not of any defective or dangerous condition of the property.*

Id. (emphasis added). As a corollary, the court rejected the plaintiffs' position that it was the school district's duty to insure and control all activities on school grounds at all times. *Id.* at 900-902. Instead, it restricted the district's responsibility to "school-related or encouraged functions and to activities taking place during school operational hours" which require persons to be on school grounds. *Id.* at 901-902. While the *Bartell* plaintiff was injured skateboarding and Plaintiffs assaulted by criminal MS-13 gang members, the logic of *Bartell* is equally apt here.

The Schoolyard was not "dangerous" or "defective" simply because pedestrians could walk or drive in. Plaintiffs' injuries were not caused by any "physical defect" in the Schoolyard, but by the objectively unreasonable use of the property (by Plaintiffs and the criminal defendants alike) and Plaintiffs' want of "due care."

Similarly, in *Levin*, the plaintiff dove from a county bridge into shallow water. 133 N.J. 35. He claimed the bridge was a "dangerous condition" because the public entity knew it was being used recreationally for diving. The claim was dismissed on summary judgment because the court found that the plaintiff's dangerous diving, not the physical state of the bridge, was the cause of injury. *Id.* at 40. The plaintiff appealed, arguing that a jury should have been allowed to decide whether the property was being "used with due care" in a way "reasonably foreseeable to defendants," and if "such use created a dangerous condition on the property." *Id.* at 43. The Court rejected these contentions, finding the *Bartell* decision analogous and noting that:

> [e]ven though the school district allegedly knew that children used its playground for skateboarding and took no measures to prevent the activity, the court found that plaintiffs failed to state a cause of action for a "dangerous condition of public property" because the injury was the direct result of the childrens' dangerous conduct, not a defect in the physical condition of the property.

Levin, 133 N.J. at 47-48. The Court also analyzed *Peterson v. San Francisco Community College District*, 36 Cal.3d 799 (1984), where the California Supreme Court held that a public community college that failed to trim foliage in a secluded part of school property or to warn of the danger of criminal acts in the face of prior assaults could be found liable for a "dangerous condition" of public property. *Id.* at 48-49. As noted in *Levin*, though, and as distinct from the facts here, the *Peterson* decision was expressly rooted in the "special relationship" between the public entity and student as "invitee," as the plaintiff "was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the

assailant might be." *See id.*; *Peterson*, 36 Cal.3d at 813. In contrast, Plaintiffs here were not students at the Mount Vernon Elementary School or the District. They did not go to the property for any school or after-school related function -- they were there to "chill" on a stoop and smoke cigars. In short, there was no "special relationship" between the District and Plaintiffs.

Thus, although they deal with "hybrid" "dangerous condition" claims involving unlocked doors/gates and third-party criminal acts, neither *Foster v. Newark Hous. Auth.*, 389 N.J. Super. 60, 68 (App. Div. 2006) nor *Roe v. New Jersey Transit Rail Operations, Inc.*, 317 N.J. Super. 72 (App. Div. 1998), on which Plaintiffs have and will rely in support of their claims, enables Plaintiffs to overcome the threshold definitional hurdle of *N.J.S.A.* 59:4-1(a). In both of those cases, unlike here, the victims were injured while using public property "with due care" in an "objectively reasonable" manner. In *Foster*, a police officer accompanied a public housing resident to her apartment at her request to gather evidence against her ex-boyfriend. Criminal activity by non-tenants at the complex was an ongoing concern. *Id.* The Housing Authority installed a lock on the entrance to the building to improve security but did not make it operable. *Id.* When the officer arrived at the apartment, the tenant's ex-boyfriend was lying in wait and shot him. *Id.* at 65. The Appellate Division held that "a jury could find that the failure to provide a lock for the front entrance of a building was a dangerous condition of the property," that the plaintiff's injuries were "proximately caused by the dangerous condition," that "in the context of this case this was a reasonably foreseeable risk," that "the dangerous condition was the result of the public entity's negligence." *Id.* at 68-69. *Foster* does not reference *Garrison* or engage in the "due care" analysis dictated by *N.J.S.A.* 59:4-1(a). However, it is clear that the officer was objectively using the property with "due care" in the "normal, foreseeable manner" -- as a police officer accompanying a tenant to her apartment at her request.

In *Roe*, the plaintiff was sexually assaulted while walking from her home to a public swimming pool. She took a common route to the pool at a normal hour, which led her through a NJ Transit station. A fence separated the train station from the adjacent park where the pool was. A gate in the fence led to the park. It permitted site access to NJ Transit personnel and was a commonly used short cut and entrance to the public park. The gate was "bolted permanently open to prevent" people from swinging on and damaging it and "because it had been open for years and was known to provide access to the park." 317 N.J. Super. at 75. The Appellate Division held that the bolted-open gate could constitute a "dangerous condition" that enhanced the risk of foreseeable criminal activity. *Id.* at 80-81. Like in *Foster*, the court did not analyze the statutory definitional objective "due care" requirement of *N.J.S.A.* 59:4-1(a) as outlined in *Garrison*. However, the plaintiff was plainly using the permanently welded-open gate with "due care" in the "normal, foreseeable manner" -- as an established path to the public park. *See Colletti v. Monmouth County*, 2007 N.J. Super. Unpub. LEXIS 1489, *13-14 (App. Div. 2007) (attached to Scheiman Cert., **Exhibit V**) (explaining that *Roe* merely stands for proposition that, "to prevail, plaintiff must demonstrate a dangerous condition existed on [public entity] property *which, when the property was being used for its intended purpose,* created an unreasonable and foreseeable risk of harm singly or in combination with the acts of third parties.")

In short, "[e]ven under the generous test applicable to motions for summary judgment, [Plaintiffs have] not proved that the property when used with due care created a substantial risk of injury to the general public." *Garrison*, 154 N.J. at 293. There is no triable issue of fact on this foundational issue. *Garrison* mandates that public entities are entitled to presume their properties will be used with due care and reinforces the Act's pronounced aversion to the creation of "novel causes of action." *See Weiss,* 128 N.J. at 383. The District had the right to

assume that the Mount Vernon School would be used with due care in the normal, foreseeable manner. There is no evidence that the elementary school grounds were "dangerous" or "defective" in relation to their normal, foreseeable use. The Schoolyard was not "dangerous" or "defective" simply because pedestrians could walk or drive in unobstructed. "The Legislature made a conscious policy choice to exclude public entities from liability for people who engage in unreasonable activities on public property." *Garrison*, 154 N.J. at 294. "To adopt the [Plaintiffs'] basis for imposing liability upon the defendants would have the affect [sic] of rewriting the definition of 'dangerous property' so as to expand its scope to an extent never envisioned by the legislature when it adopted the statute and set forth its legislative policy." *Hawes*, 232 N.J. Super. at 164.

Accordingly, Plaintiffs' "dangerous condition" claims and derivative causes of action alleged in Counts Six and Seven of the Complaint, against the District and Ms. Bolden should be dismissed with prejudice.

POINT II

PLAINTIFFS' NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFFS CANNOT CONCURRENTLY ASSERT "DANGEROUS CONDITION" AND NEGLIGENCE-BASED CLAIMS FOR INJURIES ARISING OUT OF THE SAME FACTUAL PREDICATE.

Count Five of the Complaint asserts a cause of action against the District for negligent infliction of emotional distress because of its action or inaction in maintaining the Schoolyard in an alleged "dangerous condition." (*See* Scheiman Cert., **Exhibit A**, ¶¶ 275-82.) Under the New Jersey Supreme Court case of *Ogborne v. Mercer Cemetery Corp.*, 197 N.J. 448 (2009), however, a plaintiff is barred from simultaneously advancing a negligence-based and "dangerous condition" claim against a public entity based on the same operative facts.

In *Ogborne*, the plaintiff was trapped in a public park after an employee locked the gates before closing time. *Id.* at 453. The plaintiff was forced to climb over a wall and was injured. The plaintiff brought suit against the city and alleged the defendant negligently maintained the park when it failed it ensure that the park was empty before locking the gates. *Id.* at 454. The Court held that:

> when the facts are reasonably debatable that a public employee's act or failure to act created a dangerous condition of property, and that condition of property causes an injury, the higher standard of palpably unreasonable conduct in *N.J.S.A.* 59:4-2 operates to trump the ordinary negligence standard, which otherwise applies when the act of a public employee causes an injury.

197 N.J. at 460. Thus, when the facts are reasonably susceptible to an ordinary negligence-based theory of liability or "dangerous condition" claim, the public entity must be given the benefit of defending such claims under the more "exacting standards of *N.J.S.A.* 59:4-2." *Id.* Because Plaintiffs have alleged a "dangerous condition" claim against the District under *N.J.S.A.* 59:4-2, their negligent infliction of emotional distress claim should be dismissed.

POINT III

THERE IS NO BASIS FOR IMPOSING INDIVIDUAL LIABILITY AGAINST FORMER STATE DISTRICT SUPERINTENDENT MARION BOLDEN.

Plaintiffs' claims against former State District Superintendent Marion Bolden should be dismissed with prejudice because there are no allegations or evidence in the record to establish individual liability against her for the August 4, 2007 attacks.

The sole allegation in the Complaint about Ms. Bolden is that she was "responsible for all 'conduct, equipment and maintenance of the public schools of the district.'" (*See id.*, ¶ 35) (citing *N.J.S.A.* 18A-7A-38(b)). A "dangerous condition" claim is by definition one against a public entity -- it cannot be asserted against an individual. *N.J.S.A.* 59:4-2. Nor does the

Complaint allege that Ms. Bolden, as former Superintendent, somehow individually created the alleged "dangerous condition" on the playground of one of the District's 82 schools. *See N.J.S.A.* 59:4-2(a). The undisputed factual record shows that Ms. Bolden was not responsible for the Schoolyard, as the decision for closing and locking school grounds is determined on a school-by-school basis by the local administration of each of the District's schools. (*See* Bolden Dep., Scheiman Cert., **Exhibit M**, at 54:15-22, 93:12-95:8; Freeman Dep., Scheiman Cert., **Exhibit N**, at 111:1-112:4.)

Further, the Complaint does not assert an individual negligence claim against Ms. Bolden under *N.J.S.A.* 59:2-2 that could be vicariously imputed to the District. Even if it did, under *Ogborne*, 197 N.J. at 460, any individual negligence-based claims arising out of the August 4, 2007 attacks would necessarily be subsumed under the stricter "dangerous condition" standard interposed by *N.J.S.A.* 59:4-2. Accordingly, Counts One ("dangerous condition" liability under N.J.S.A. 59:4-2), Five (negligent infliction of emotional distress), Six (wrongful death) and Seven (survival) of the Complaint should be dismissed against Ms. Bolden with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint against the State-Operated School District for the City of Newark and former State District Superintendent Marion A. Bolden, should be dismissed with prejudice.

Respectfully submitted,

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Defendants
State-Operated School District for the City of Newark and former State District Superintendent Marion A. Bolden

By: _____
Vito A. Gagliardi, Jr., Esq.

Dated: May 18, 2012